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# CARRIAGE BY LAND.

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## SECTION 1.—INTRODUCTION.

1. A carrier is one who undertakes to convey goods, passengers, or animals from a place within the realm to a place within or without the realm. The contract may be gratuitous or for hire, and it may be undertaken as a special contract or in the capacity of a common carrier. The law of carriage by land includes the law applicable to carriage by inland waters. Carriage by rail and canal is largely subject to statutes which modify the general principles of the law of inland carriage. See RAILWAYS and CANALS for the details of these modifications.

2. Carriers are of two classes, special or private carriers and common carriers. A common carrier is one who for hire undertakes the carriage of goods or animals generally, or of certain classes of these, for any of the public indiscriminately. Generally he does so to and from certain definite places,<sup>1</sup> but this is not essential so long as he professes the business of carrier as a public employment.<sup>2</sup> He may be a common carrier in regard to all classes of goods, or he may hold

<sup>1</sup> Bell, Prin. s. 160.

<sup>2</sup> *Nugent v. Smith*, 1876, 1 C.P.D. 243.

himself out as a common carrier in regard to some and not to others. A special carrier is one who undertakes to carry on occasion, but not as a public employment, or under a special contract. Thus a removal contractor carrying on business generally as such, but inspecting the furniture and fixing a price before undertaking the work, is not a common carrier.<sup>1</sup>

### SECTION 2.—GRATUITOUS CARRIAGE.

3. A person who carries without hire must use reasonable care in the circumstances.<sup>2</sup> According to Erskine,<sup>3</sup> the duty of a gratuitous carrier is to show such diligence as he employs in his own affairs, and the rule formerly was that there was no liability except for gross negligence. According to modern decisions the care must be such as a man of common prudence exercises about his own property of a like description. The rule applies equally to the carriage of passengers who are being conveyed free of charge. In the event of the goods carried being lost or damaged while in the custody of a gratuitous carrier, “the onus rests on him to explain how this happened, or at least to shew that he exercised the necessary reasonable care.”<sup>4</sup>

### SECTION 3.—THE CARRIAGE OF GOODS.

#### SUBSECTION (1).—*General.*

4. This form of the contract of carriage, which is the *locatio operis mercium vehendarum*, is for the safe carriage of commodities and their delivery in good condition in consideration of a hire stipulated or implied. The contract may be express or implied, and gives rise to duties with corresponding rights in the consignor, the carrier, and the consignee.

#### SUBSECTION (2).—*The Consignor.*

##### (i) *Packing, Addressing, and Stowing of Goods.*

5. The consignor must pack the goods properly, but if the carrier accepts goods obviously badly packed, he may be barred from pleading the defective packing as a defence if they are damaged in transit. The packing must be reasonably sufficient for the journey.<sup>5</sup> The consignor's duty is to see that the goods are sufficiently and correctly addressed. If the address is not “full, distinct, and ample,”<sup>6</sup> any loss caused thereby falls on the consignor as the party in fault. The carrier is not barred from pleading this by accepting goods the address of which is merely ambiguous, as where there are two places bearing the same name.<sup>6</sup> If

<sup>1</sup> *Watkins v. Cottell*, [1916] 1 K.B. 10; *Pearcey v. Player*, 1883, 10 R. 564.

<sup>2</sup> *Harris v. Perry & Co.*, [1903] 2 K.B. 219.

<sup>3</sup> Ersk. iii. 3, 36.

<sup>4</sup> *Copland v. Brogan*, 1916 S.C. 277; Bell, Prin. s. 218.

<sup>5</sup> *London and North-Western Rly. Co. v. Richard Hudson & Sons, Ltd.*, [1920] A.C. 324.

<sup>6</sup> *Caledonian Rly. Co. v. Hunter & Co.*, 1858, 20 D. 1097.



the consignor takes upon himself the duty of stowing the goods in the vehicle in which they are to be carried, the loss due to defective stowage falls upon him.<sup>1</sup> But his mere presence while the carrier packs them on the vehicle, even although the consignor does not protest against the method of stowage, will not relieve the carrier.<sup>2</sup>

(ii) *Delivery to Carrier.*

6. The consignor must deliver the goods to the carrier or to someone authorised to act for him. Where he or his agent personally accepts the goods, delivery is complete no matter where it is made, provided it is in conformity with the known course of the carrier's business, where acceptance is at the hands of a servant.<sup>3</sup> If the carrier directs that goods should be left at a particular booking-office, or if it has been his constant usage and practice to accept goods for carriage left at a particular place without special notice to him of such deposit, delivery there will be enough to charge him with the custody.<sup>4</sup> But merely leaving the goods in a yard where other carriers also put up, without actual delivery to the carrier or his servant, is not sufficient to imply acceptance.<sup>5</sup> A carrier may ratify the wrongful acceptance of goods by his servants, but whether such ratification implies acceptance of them for carriage with its liabilities is a question of fact.<sup>6</sup>

(iii) *Dangerous Goods.*

7. The consignor impliedly warrants that the goods are fit for ordinary carriage, and if they are such as to require special care so as to prevent damage, he must warn the carrier, unless the latter knows or ought to know the contents and risks of the package.<sup>7</sup> If he fails to inform the carrier of any special risk attaching to the carriage of the goods, and injury is caused to person or property, the consignor is liable in damages to those who suffer loss.<sup>8</sup> It is not necessary to prove that the consignor knew the danger. Merely labelling the package as containing something which may be dangerous (*e.g.* "weed-killer") is not always sufficient notice to the carrier.<sup>9</sup>

8. The Explosives Act, 1875,<sup>10</sup> provided for certain regulations regarding the carriage of prescribed classes of dangerous goods and also of any substance declared by Order in Council to be specially dangerous and to be deemed an explosive within the meaning of the Act. By an Order in Council of August 5, 1875, picric acid and its compounds were

<sup>1</sup> *Rain v. Glasgow and South-Western Rly. Co.*, 1869, 7 M. 439.

<sup>2</sup> *Paxton v. North British Rly. Co.*, 1870, 9 M. 50.

<sup>3</sup> *Slim v. Great Northern Rly. Co.*, 1854, 14 C.B. 647.

<sup>4</sup> *Colepepper v. Good*, 1832, 5 Car. & P. 380.

<sup>5</sup> *Selway v. Holloway*, 1695, 1 Ld. Raym., 46.

<sup>6</sup> *Harrisons & Crossfield v. London and North-Western Rly. Co.*, [1917] 2 K.B. 755.

<sup>7</sup> *Bamfield v. Goole and Sheffield Transport Co., Ltd.*, [1910] 2 K.B. 94.

<sup>8</sup> *Cramb v. Caledonian Rly. Co.*, 1892, 19 R. 1054.

<sup>9</sup> *Cramb, supra*, at p. 1060.

<sup>10</sup> 38 Vict. c. 17, ss. 37, 38.

declared explosives. Under the Act harbour authorities, railway and canal authorities, and occupiers of docks and wharves are directed to make by-laws for the conveyance of explosives. By-laws applicable to the carriage otherwise of explosives were issued under the Act by the Secretary of State and were first published in the *Edinburgh Gazette* of Dec. 10, 1875.<sup>1</sup>

9. The consignor of dangerous goods by railway is bound to indemnify the railway company against loss caused by such goods and also to compensate the company's servants if they suffer injury from these goods.<sup>2</sup> The consignor is not bound to open a package or declare its contents to the carrier<sup>3</sup> unless he is claiming the benefit of a special rate of carriage for a specified class of things, or unless there are reasons for believing that the goods are dangerous under statute or, probably, at common law. A carrier, however, is not liable for allowing packages in his care to be opened by the authorities in search of illicit traffic, even although the package on being opened is found to contain nothing to which objection could be taken.<sup>4</sup>

#### (iv) *Payment of Hire.*

10. The consignor is as a rule bound to pay the hire, any arrangement as to payment on delivery by the consignee being one of convenience; but this depends on the contract. Its terms may shew that it is one between the carrier and the consignee, or even a third party. The obligation of the consignor may extend to cover the expense caused by delay on the part of the consignee to take delivery, as where there are demurrage charges for detaining wagons.<sup>5</sup>

### SUBSECTION (3).—*Duties of the Carrier.*

#### (i) *General Duty of Care.*

11. Duties arise under contract as to all carriers, and also under certain rules of public policy in regard to common carriers. These obligations commence when the carrier is charged with the goods by their complete delivery to him for the purpose of carriage. His obligations, apart from those prescribed by public policy and special agreement, involve the safe conveyance of the goods in a reasonably fit vehicle in which they are sufficiently packed, by the agreed-on or customary route, within a reasonable time, and delivery in terms of the contract. In the event of the goods being lost or injured the presumption is against the carrier on all these points, and the burden is laid on him of proving that the loss or injury arose from some cause for which he is not responsible.<sup>6</sup>

<sup>1</sup> As to carriage of petroleum, etc., see Petroleum Act, 1926, s. 9 and Third Schedule.

<sup>2</sup> Railways Act, 1921, 11 & 12 Geo. V. c. 55, s. 50 (2).

<sup>3</sup> *Cramb, supra.*

<sup>4</sup> *Boswell v. North British Rly. Co.*, 1902, 4 F. 500.

<sup>5</sup> *Glasgow and South-Western Rly. Co. v. Polquhain Coal Co.*, 1916 S.C. 36; 1915, 2 S.L.T. 273.

<sup>6</sup> *Anderson v. North British Rly. Co.*, 1875, 2 R. 443.

(ii) *Sufficiency of Vehicle.*

12. The vehicle must be sufficient for the safe conveyance of the goods. This sufficiency must extend not only to the vehicle itself, but to all its accessories. Thus in road transit the tackle, harness, horses, drivers, mechanical equipment, etc., and in railways the permanent way, signals, staff, and also the control system of working, must be adequate for its purpose. The carrier, however, is not liable for latent defects. It is enough to free him from liability other than the liability of a common carrier, if the vehicle and its accessories be sufficient so far as care can discover.<sup>1</sup>

(iii) *Loading.*

13. Further, the carrier must stow the goods securely on the vehicle so that, having regard to their nature and to the risk and dangers attending the journey, they may be carried safely to their destination.<sup>2</sup> This includes loading in such a way that they do not come in contact with overhead obstructions, such as a bridge.<sup>3</sup> The goods must not be put in an overloaded vehicle. The carrier is relieved of responsibility if the consignor undertakes the duty of stowing his goods in the vehicle,<sup>4</sup> but not by the mere presence of the consignor during the loading.<sup>5</sup>

14. The obligation of the carrier is, generally, under his contract, to take due care under the circumstances. He must take all reasonable precautions against injury from concussion or explosion,<sup>6</sup> or from exposure to bad weather.<sup>7</sup> The precautions which he must take are those which would suggest themselves to be within the knowledge and capacity of well-informed and competent business men acting as carriers, and the diligence prestable is such as prudent, skilful men engaged in that kind of business might be expected to use. He is not responsible for damage arising from wholly unusual and unexpected causes, but in the event of loss the onus is on him to prove that it was due to such unusual circumstances.<sup>8</sup>

(iv) *Route.*

15. The carrier must carry the goods by the route agreed on, or, if there be no express agreement, by the one he professes or by the usual one. But he is not bound, apart from agreement, to carry by the shortest route. If he deviates from the proper route and the goods are damaged or lost, the carrier is liable unless he can prove that the loss was unconnected with his breach of contract.<sup>9</sup> Where the carrier protects

<sup>1</sup> *Cargill v. Dundee and Perth Rly. Co.*, 1848, 11 D. 216; *Christie v. Griggs*, 1809, 2 Camp. 79.

<sup>2</sup> *London and North-Western Rly. Co. v. Richard Hudson & Sons, Ltd.*, [1920] A.C. 324 and 336.

<sup>3</sup> *Bastable v. North British Rly. Co.*, 1912 S.C. 555.

<sup>4</sup> *Paxton v. North British Rly. Co.*, 1870, 9 M. 50.

<sup>5</sup> *Rain v. Glasgow and South-Western Rly. Co.*, 1869, 7 M. 439.

<sup>6</sup> *Siordet v. Hall*, 1828, 4 Bing. 607.

<sup>7</sup> *London and North-Western Rly. Co. v. Richard Hudson & Sons, Ltd.*, [1920] A.C. 324.

<sup>8</sup> *Ralston v. Caledonian Rly. Co.*, 1878, 5 R. 671.

<sup>9</sup> *Davis v. Garrett*, 1830, 6 Bing. 716.



himself by a clause exempting himself from liability, it does not protect him against claims for loss occurring while he is deviating from his proper route.<sup>1</sup>

(v) *Forwarding in due Course.*

16. The carrier is bound to forward goods in due course—that is, with reasonable speed—and this applies particularly to the case of perishable goods. He may by agreement avoid liability for loss caused by delay in transit of such goods,<sup>2</sup> and in any event he is not liable under his contract for delay caused by something beyond his control. Apart from express stipulation, there is no guarantee to carry them so as to have the goods available on arrival for a particular market.<sup>3</sup> His primary duty is to carry safely, and he is justified in incurring delay if that is necessary to secure safe carriage.<sup>4</sup> In calculating what is a reasonable time all circumstances must be taken into account, including, *e.g.*, a strike of the carrier's servants.<sup>5</sup>

17. If the carrier has knowledge of any unusual cause of delay, he is bound to give notice to the sender on receiving the goods, but accidental delays are incident to the contract of carriage, and no liability attaches to the carrier unless they could have been foreseen or prevented.<sup>6</sup> If, owing to circumstances beyond the control of the carrier, perishable goods cannot be delivered within the expected time, he may sell them without being liable, if it is impossible to get the owner's instructions,<sup>7</sup> but it is his duty to communicate with the owner if possible.<sup>8</sup> By the Sale of Goods Act, 1893, s. 33, the risk of deterioration necessarily incident to the course of transit falls, apart from agreement or fault, on the buyer. If the carrier undertakes to carry for a special purpose, *e.g.* to catch a particular steamer, he is liable for delay preventing this being done.<sup>9</sup>

(vi) *Successive Carriers.*

18. When the contract involves carriage by more than one carrier, it is, apart from special stipulation, one contract from beginning to end. Porters or carters whom the carrier employs are the carrier's servants, for whom he is responsible, whether portorage be payable or not, or whether he is limited in his selection, as where he can only employ licensed porters.<sup>10</sup> Formerly, where the goods were accepted for delivery at a point beyond the carrier's terminus, delivery to a second carrier was

<sup>1</sup> *Ld. Polwarth v. North British Rly. Co.*, 1908 S.C. 1275; *Neilson v. London and North-Western Rly. Co.*, [1922] 1 K.B. 192.

<sup>2</sup> *Finlay v. North British Rly. Co.*, 1870, 8 M. 959.

<sup>3</sup> *Anderson v. North British Rly. Co.*, 1875, 2 R. 443.

<sup>4</sup> *Taylor v. Great Northern Rly. Co.*, 1866, L.R. 1 C.P. 385.

<sup>5</sup> *Hick v. Raymond & Reid*, [1893] A.C. 22.

<sup>6</sup> *M'Connachie v. Great North of Scotland Rly. Co.*, 1875, 3 R. 79.

<sup>7</sup> *Sims v. Midland Rly. Co.*, [1913] 1 K.B. 103.

<sup>8</sup> *Springer v. Great Western Rly. Co.*, [1921] 1 K.B. 257.

<sup>9</sup> *Bates v. Cameron*, 1855, 18 D. 186.

<sup>10</sup> *Armstrong v. Edinburgh and Leith Shipping Co.*, 1825, 3 S. 464.



held to discharge the original carrier, but it is now settled that in the absence of special stipulation a carrier accepting goods for delivery at a place beyond his terminus is responsible for their safe carriage during the whole of their transit. Anyone acting as carrier beyond the terminus of the original carrier is an agent of the latter.<sup>1</sup> Where goods pass through several hands, the last carrier is entitled not only to payment of his own carriage, but of any money he has paid to the carrier before him as a condition of getting the goods.<sup>2</sup>

(vii) *Delivery to Consignee.*

19. The carrier must deliver the goods according to the terms of his contract or usage of trade. He is liable for failure to obey instructions in the address, as where he hands over goods in good faith to a vessel other than that named in the address as the subsequent mode of transit.<sup>3</sup> As to the effect on delivery of general instructions of the consignee, see *infra*.<sup>4</sup> He must use reasonable diligence in making delivery, having regard to the means at his disposal for forwarding the goods. If, by the terms of the contract or by custom the consignee is to call for goods on arrival, as where they are marked "to be called for," the carrier remains liable as carrier until the consignee has had a reasonable time to remove the goods. When such time has elapsed and the goods remain in the hands of the carrier, the liability becomes that of an ordinary warehouseman. As a rule the carrier should notify the consignee that the goods are awaiting his removing them.<sup>5</sup>

20. If the carrier attends at the address given and the goods are there received by a person apparently respectable, who has obtained access to the consignee's premises and who signs for the goods in the consignee's absence, and then misappropriates them, the carrier is held to have made a good delivery and is not liable for the loss.<sup>6</sup> If the goods are tendered at a reasonable hour at the address given and the addressee refuses to accept them, or cannot be found, the carrier's liability becomes that of a custodian and he is liable only for want of reasonable care.<sup>7</sup> Apart from special stipulation in the contract, the carrier may deliver the goods to the named consignee at his request at a place other than that to which they are addressed.<sup>8</sup>

21. The carrier's obligation to deliver may be ended by the unpaid seller of the goods exercising his right of stoppage in transit.<sup>9</sup> He may require the carrier to deliver the goods according to his directions, or to return them, and if the carrier fails to obey the instructions of the

<sup>1</sup> *Caledonian Rly. Co. v. Hunter & Co.*, 1858, 20 D. 1097; *Metzenburg v. Highland Rly. Co.*, 1869, 7 M. 919; *Crouch v. Great Western Rly. Co.*, 1857, 26 L.J. Ex. 418 at 422.

<sup>2</sup> "*Hibernian*," [1907] P. 277.

<sup>3</sup> *Gilmour v. Clark*, 1853, 15 D. 478.

<sup>4</sup> Para. 47.

<sup>5</sup> *Chapman v. Great Western Rly. Co.*, 1880, 5 Q.B.D. 278.

<sup>6</sup> *Galbraith & Grant v. Block*, [1922] 2 K.B. 155.

<sup>7</sup> *Heugh v. London and North-Western Rly. Co.*, 1870, L.R. 5 Ex. 51.

<sup>8</sup> *Cork Distilleries Co. v. Great South and Western Rly. Co.*, 1874, L.R. 7 H.L. 269.

<sup>9</sup> Sale of Goods Act, 1893, s. 44.

unpaid seller, he is liable in damages.<sup>1</sup> The seller has this right although he is not a party to the contract of carriage. If he exercises the right of stoppage in transit, he is bound to give the carrier directions as to delivery or to take delivery himself of the goods and pay the carrier's charges. If, as a result of exercising the right of stoppage, the seller prevents the carrier conveying them to their ultimate destination, he is liable to the carrier not only for the carriage to the place of stoppage or of actual delivery, but for the carriage to the original destination.<sup>2</sup>

22. The general rule is that the carrier is not discharged of the goods while anything remains for him to do as carrier, either by contract or by custom.<sup>3</sup> If the carrier fails to deliver according to his contract, the amount in damages for which he is liable is governed by the rules of *Hadley v. Baxendale*.<sup>4</sup>

#### SUBSECTION (4).—*Special Obligations of Common Carriers.*

23. Common carriers are under special obligations on the ground of public policy. To render a person liable as a common carrier he must profess the business of carrying goods for all persons indiscriminately as a public employment and must hold himself out, either expressly or by a course of conduct, as ready to engage in the carrying of goods for hire as a business and not as a casual occupation. Whether a person is a common carrier is a question of fact. Carrying on business to which the conveyance of goods is incidental does not necessarily mean that it includes the business of a public carrier. Thus a furniture remover is not a common carrier,<sup>5</sup> and wharfingers, who, as incidental to their business, transport goods for their customers by lighters from the importing ships to their warehouse, are not subject to the liability of common carriers, but only for negligence, because they do not hold themselves out as ready to carry goods for any persons other than customers.<sup>6</sup> To have the status of a common carrier does not mean that all kinds of goods must be carried; the carrier may lay himself out to carry certain classes of goods only. He may even be a common carrier in regard to certain kinds of goods and a special carrier in regard to others.

24. A common carrier is bound to receive and carry goods of the description he professes to carry in that capacity, and he must take them from anyone who offers to pay his hire. If he refuses, he may be made liable in damages, but he may decline to accept goods until he is ready to set out on his accustomed journey,<sup>7</sup> or if they are tendered

<sup>1</sup> *Verschures Creameries v. Hull and Netherlands Steamship Co.*, [1921] 2 K.B. 608.

<sup>2</sup> *Booth Steamship Co. v. Cargo Fleet Iron Co.*, [1916] 2 K.B. 570.

<sup>3</sup> *Bishop v. Mersey and Clyde Navigation Steam Co.*, 1830, 8 S. 558.

<sup>4</sup> 1854, 9 Ex. 341; "*Den of Ogil*" *Co. v. Caledonian Rly. Co.*, 1902, 5 F. 99.

<sup>5</sup> *Pearcey v. Player*, 1883, 10 R. 564.

<sup>6</sup> *Consolidated Tea and Lands Co. v. Oliver's Wharf*, [1910] 2 K.B. 395; with which cf. *Bell*, *Prin.* s. 236.

<sup>7</sup> *Lane v. Cotton*, 1701, 1 Ld. Raym. 652.

too late, or if his conveyance is already full. He is not bound to accept goods insufficiently packed for the journey. If he does accept goods badly packed he is not thereby relieved from using reasonable care in conveying them.<sup>1</sup> He may refuse to carry commodities the carriage of which is attended with special risk or inconvenience, but he may agree to carry them as a special carrier, as in the case of dogs,<sup>2</sup> or of bulky articles such as an organ.<sup>3</sup> His right to refuse to carry as a common carrier extends to articles of great value if he has no convenient means of carrying them safely,<sup>4</sup> and it has been held that a refusal to carry was reasonable when it appeared it was a time of public commotion and that the goods which the carrier was desired to carry were the object of public hostility, so that their safe carriage would have been attended with unusual risk.<sup>5</sup> As to his obligation to carry goods of the nature specified in the Explosives Act, 1875, see *supra*.<sup>6</sup>

25. A common carrier is entitled to have his hire paid to him before he takes the goods into his custody. His acceptance marks the commencement of the risk undertaken by him, and he is entitled to payment of a reasonable sum for the carriage. The hire demanded must be reasonable, but at common law he is not under any obligation to treat all his customers equally.<sup>7</sup> What is reasonable depends on the character and value of the goods. The carrier is entitled to make a higher charge to cover the greater risk in carrying valuable, perishable, or fragile goods. If the carrier refuses to carry for a reasonable hire, he may be liable in damages, and if a customer in order to induce him to perform his duty pays under protest a larger sum than is reasonable, he may recover the surplus beyond what the carrier was entitled to receive.<sup>7</sup>

SUBSECTION (5).—*The Liability of Common Carriers under the Edict.*

26. A common carrier in addition to his liabilities under his contract is held to be practically an insurer of the safe carriage of the goods. He is liable for every accident, irrespective of whether he shews due care and diligence or not. This unusual liability is, in Scotland, attributed to the Prætor's Edict, the terms of which are '*Nautæ, cauponæ, stabularii, quod cujusque saluum fore receperint, nisi restituant, in eos judicium dabo.*'<sup>8</sup> The rule of the Roman law did not apply to land carriage. It only applied to carriage by sea, and made no distinction between common carriers and special carriers. After considerable uncertainty, and probably influenced by the merchant law of England,

<sup>1</sup> *Munro v. North British Rly. Co.*, 1905, 21 S.L. Rev. 18; approved in *Sutcliffe v. Great Western Rly. Co.*, [1910] 1 K.B. 478 at 505.

<sup>2</sup> *Paxton v. North British Rly. Co.*, 1870, 9 M. 50.

<sup>3</sup> *Wood & Co. v. G. & J. Burns*, 1893, 20 R. 602.

<sup>4</sup> *M'Manus v. Lancashire and Yorkshire Rly. Co.*, 1859, 28 L.J. Ex. 353.

<sup>5</sup> *Edwards v. Sherratt*, 1801, 1 East, 604.

<sup>6</sup> Para. 7.

<sup>7</sup> *Great Western Rly. Co. v. Sutton*, 1869, L.R. 4 H.L. 226, per Blackburn J. at 237.

<sup>8</sup> Dig. iv. 9, 1.



the rule was extended by our Courts to land carriage, but at the same time it was restricted to common carriers.<sup>1</sup>

27. A common carrier's liability under the Edict is only avoided on recognised grounds, viz. where the loss is due to *damnum fatale* or inevitable accident, or is caused by some inherent vice in the thing carried, or where the consignor is personally barred by his actings from insisting on the carrier's liability as an insurer.<sup>2</sup> The law in England is similar, although historically it is different in origin. The equivalent exception to *damnum fatale* under English law is "the Act of God or the King's enemies." These terms are usually treated as synonymous with *damnum fatale* or inevitable accident.<sup>3</sup>

28. Neither robbery nor theft is held to be a sufficient answer for the carrier, as these are the main dangers which the rule, on the ground of public policy, was intended to meet. Fire is in England included among the risks which a common carrier must bear, but in Scotland it was classed as a *damnum fatale* so as to free the carrier from liability, unless fault or fraud could be established. But by the Mercantile Law (Amendment) Act, 1856,<sup>4</sup> it is provided that "all carriers for hire of goods within Scotland shall be liable to make good to the owner of such goods all losses arising from accidental fire while such goods are in the custody or possession of such carriers." In addition to the above-named common law exceptions to the carrier's liability as insurer, there are also certain statutory limitations of that liability.

SUBSECTION (6).—*Common Law Exceptions to Liability under the Edict.*

(i) *Damnum fatale or Inevitable Accident.*

29. This has been defined by Lord Westbury as being "one of those things which do not involve any legal liability—what are denominated in the law of Scotland *damnum fatale* occurrences—circumstances which no human foresight can provide against and of which human prudence is not bound to recognise the possibility, and which, when they do occur, therefore are calamities that do not involve the obligation of paying for the consequences that may result from them."<sup>5</sup> The definition of James L.J. in *Nugent*<sup>6</sup> was accepted in *Mustard v. Paterson*<sup>7</sup> as applicable to Scotland, where it stated that a common carrier is not liable for any accident "as to which he can shew that it is due to natural causes directly or exclusively without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected of him." This would cover accidents due to causes of an overwhelming nature, such as violent tempest, floods,

<sup>1</sup> Juridical Review, 1926, vol. 38, p. 205.    <sup>2</sup> Ersk. iii. 1, 29; Bell, Prin. ss. 169, 235.

<sup>3</sup> Bell, Prin. s. 235, but see *Nugent v. Smith*, 1876, L.R. 1 C.P.D. 423 at 429, per Cockburn C.J.

<sup>4</sup> 19 & 20 Vict. c. 20, s. 17.

<sup>5</sup> *Tennent v. Earl of Glasgow*, 1864, 2 M. (H.L.) 22, per Westbury L.C. at 27.

<sup>6</sup> *Nugent v. Smith*, 1876, 1 C.P.D. 423 at 444.

<sup>7</sup> 1923 S.C. 142.



earthquakes, and the like. But in order that a natural event, such as a flood or high tide, should be held to be a *damnum fatale* or act of God, it is not necessary that it should never have happened before. It is sufficient that its happening could not reasonably have been expected. If there is nothing to lead to the inference that it is likely to recur, the happening again does not prevent its being a *damnum fatale*.<sup>1</sup>

30. The definition above quoted would also cover what in English law is called the act of the King's enemies. This may mean domestic as well as foreign enemies with whom the sovereign of the carrier is at war, as where subjects have rebelled against the Crown. It covers damage caused to the goods by the forces of the Crown while in action against the rebels, but it does not cover the case of an ordinary riot or forcible robbery.<sup>2</sup>

(ii) *Inherent Vice.*

31. Inherent vice is such defective natural quality in the thing carried as will, by its operation or internal development, lead to the injury or destruction of the thing.<sup>3</sup> Thus a latent defect in the thing carried, as where rottenness in some essential part causes it to collapse, would relieve the common carrier from liability as insuring its safety. So also the deterioration of perishable goods in course of nature, in spite of their being carried with reasonable dispatch, would, at common law, fall under the same category. In one recent case bad packing was classed as inherent vice.<sup>4</sup> The rule applies specially to the carriage of animals where a vicious animal injures itself on the journey.<sup>5</sup> The carrier remains liable if through negligence he has contributed to the loss; and if he accepts knowingly a vicious animal, he must make reasonable provision for its safety unless he qualifies his obligation by special stipulation.

(iii) *Personal Bar.*

32. The consignor may by his actings be barred personally from holding the common carrier liable as an insurer. Thus if he packs insufficiently, and this is not apparent to the carrier, the latter is not liable.<sup>6</sup> If the carrier accepts such goods he is not relieved from shewing due care for them, having regard to their badly packed condition, from the beginning of the journey if he knew, or from the time of discovery if he did not. Again, the carrier is not liable if the consignor misleads him as to the nature of the goods to be carried, so that he cannot take adequate means for insuring their safety. If the consignor fraudulently overloads a wagon so as to carry more for a stipulated hire than he was entitled

<sup>1</sup> *Nitrophosphate Manure Co. v. London and St Katherine Dock Co.*, 1877, 9 Ch. D. 503.

<sup>2</sup> *Curtis v. Mathews*, [1919] 1 K.B. 425.

<sup>3</sup> *Lister v. Lancashire and Yorkshire Rly. Co.*, [1903] 1 K.B. 878.

<sup>4</sup> *London and North-Western Rly. Co. v. Richard Hudson & Sons, Ltd.*, [1920] A.C. 324.

<sup>5</sup> *Nugent v. Smith*, *supra*; *Ralston v. Caledonian Rly. Co.*, 1878, 5 R. 671.

<sup>6</sup> *London and North-Western Rly. Co. v. Richard Hudson & Sons, Ltd.*, [1920] A.C. 324.

to, the carrier would escape liability for damage due to such overloading. In all cases, however, the onus of proving the exception is on the carrier, and if the accident is unexplained he remains liable as an insurer.<sup>1</sup>

33. Although danger arises which would exempt the carrier from liability as being an inevitable accident, he must check the loss so far as possible. His duty is to do what is reasonable in the circumstances. This duty, however, does not extend to taking precautions against the risk of unusual or special dangers unless there were good reason to fear their happening.<sup>2</sup> In any such emergency, if there is time, the instructions of the owner should be obtained and followed so far as possible.

SUBSECTION (7).—*Limitation by Statute of a Common Carrier's Liability.*

34. The heavy responsibility laid on common carriers resulted in their trying to limit their liability by putting up public notices intimating various restrictions on their common law obligations. Difficult questions arose as to the construction of such notices and also as to how far consignors were bound by their terms. To remedy what had become an abuse, the Carriers Act, 1830,<sup>3</sup> was passed. The principal Act has been amended by the Carriers Act Amendment Act, 1865,<sup>4</sup> and by the Railways Act, 1921.<sup>5</sup>

35. The purpose of the Carriers Act was to stop the issue of public notices restricting liability by declaring them to be invalid, and in return to relieve common carriers of liability as insurers of certain classes of goods small in bulk relatively to their value. By s. 4 of the Act the liability of mail contractors, stage-coach proprietors, and other common carriers by land for hire is declared to be in no ways limited by any public notice or declaration. The carrier, however, may still enter into special contracts with individual customers, limiting his responsibility (s. 5). Thus a common carrier may limit his liability by delivering to the consignor a ticket or other notice containing conditions under which the carrier accepts the goods. If these conditions are brought home to the consignor, he is bound by them.<sup>6</sup> Railway and Canal Companies have their powers of qualifying their obligations by special contract limited by the Railway and Canal Traffic Act, 1854.<sup>7</sup>

36. Where the articles to be carried are of the kind which a common carrier professes to carry, the conditions imposed must not be unreasonable. Notices conveyed by ticket or similar document are read strictly, and do not exempt from liability for the fault of servants unless the terms are clear.<sup>8</sup> A stipulation that the carrier should be free from liability except from damage arising from "wilful misconduct"

<sup>1</sup> *Mustard v. Paterson*, 1923 S.C. 142.

<sup>3</sup> 11 Geo. IV. & 1 Will. IV. c. 68.

<sup>5</sup> 11 & 12 Geo. V. c. 55.

<sup>7</sup> 17 & 18 Vict. c. 31.

<sup>2</sup> *Notara v. Henderson*, 1872, L.R. 7 Q.B. 225.

<sup>4</sup> 28 & 29 Vict. c. 94.

<sup>6</sup> *Henderson v. Stevenson*, 1875, 2 R. (H.L.) 71.

<sup>8</sup> *Sutton & Co. v. Ciceri & Co.*, 1890, 17 R. (H.L.) 40; *Neilson v. London and North-Western Rly. Co.*, [1922] 1 K.B. 192.

on the part of his servants does not free from liability for their negligence. "Wilful misconduct" is not something more than, or opposed to, "negligence."<sup>1</sup> But where carriers are not common carriers, an exception of liability for loss by fire protects the carrier against such loss caused by negligence of his servants, although negligence is not specified in the excepting condition.<sup>2</sup>

37. The conditions may be incorporated into the contract by a reference in the ticket to some other document containing the terms and the conditions; it is a question of fact whether reasonable notice of the conditions affecting liability is given to a consignee.<sup>3</sup> It is not necessary to prove for this purpose that the consignor read the conditions; if he knew there was something printed on the ticket, but does not trouble to read it, he is held to have agreed to its terms,<sup>4</sup> unless the Court is satisfied that the consignor did not know that the printed matter contained conditions.<sup>5</sup>

38. The Carriers Act provides that no common carrier by land for hire is liable as an insurer of articles of certain descriptions contained in any parcel or package delivered, either for carriage for hire, or as passengers' luggage, when the value of such articles contained in such parcel or package exceeds £10, unless when they are received the value is declared, and an increased charge or agreement to pay such increased charge is accepted by the carrier (s. 1). Such increased rate of charge must be notified by a notice conspicuously affixed in every place where such parcels are received (s. 2), and the carrier must give a receipt for the increased charge when required or lose the benefit of the Act (s. 3). A consignor who is entitled to damages is entitled to recover the increased charges in addition to compensation for loss of, or injury to, the goods (s. 7).

39. The carrier may plead the Act even though he does not publish in statutory form his rate of increased charges. The affixing of the notice under s. 2 has been held in the Scottish Courts to be merely a condition of the carrier's right to make an increased charge over the usual rates, and accordingly a carrier in whose hands goods falling within the Act had been lost, was entitled to claim exemption from liability, in respect that no declaration had been made in terms of s. 1, although he had posted no notice in terms of s. 2.<sup>6</sup>

40. The carrier is not relieved from liability for the felonious acts of his servants, nor the servants for their personal liability for such acts. This includes the acts of all those engaged in the carriage, even sub-contractors, but it only applies to acts involving more than mere negligence; there must be something substantially criminal, and actual

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<sup>1</sup> *Bastable v. North British Rly. Co.*, 1912 S.C. 555; 1912, 1 S.L.T. 259.

<sup>2</sup> *Fagan v. Green & Edwards, Ltd.*, [1926] 1 K.B. 102.

<sup>3</sup> *Hood v. Anchor Line, Ltd.*, 1918 S.C. (H.L.) 143; 1918, 2 S.L.T. 118.

<sup>4</sup> *Grand Trunk Rly. Co. v. Robinson*, [1915] A.C. 740.

<sup>5</sup> *Williamson v. North of Scotland, etc., Navigation Co.*, 1916 S.C. 554; 1916, 1 S.L.T. 228.

<sup>6</sup> *Rusk v. North British Rly. Co.*, 1920, 2 S.L.T. 139, [O.H. Lord Hunter].



proof of this must be furnished by the person claiming compensation.<sup>1</sup> It is not necessary to shew that the felony was of any particular servant if there is proof that it must have been of some one or other of them ; but it is not sufficient for the pursuers to prove merely that there was a greater probability of the felony having been committed by servants of the carrier than by strangers.<sup>2</sup>

41. The protection covers negligence of the carrier even in the case of goods carried beyond their destination.<sup>3</sup> Where a packing-case contains some articles within the Act and some without it, the value of the case and of the articles which are outwith the Act may be recovered in case of loss, even though the Act has not been complied with by declaring the value of the other articles.<sup>4</sup> Nothing more than the actual value of the articles declared can be recovered. That value must be proved, and the declaration is not conclusive ; it only limits the liability.<sup>5</sup>

42. Even though the carrier may reasonably be held to be aware of the contents of the package, as where it is labelled as containing goods of a kind within the Act, the statutory declaration must be made if the carrier is to be charged with liability as an insurer.<sup>6</sup> The application of the Carriers Act to Railway Companies has been preserved by s. 7 of the Railway and Canal Traffic Act, 1854,<sup>7</sup> but the maximum value for which a Railway Company would be liable in the absence of the statutory declaration has been raised as from "the appointed day" to £25 by the Railways Act, 1921.<sup>8</sup>

43. The articles for which protection is given are, according to the Carriers Act, those "of great value in small compass." They are gold or silver coin, gold or silver in a manufactured or unmanufactured state, precious stones, jewellery, trinkets, that is articles chiefly or solely ornamental,<sup>9</sup> watches, clocks, or timepieces of any description, bills, which must be complete as bills,<sup>10</sup> notes of the Banks of England, Scotland, and Ireland, or of any other bank in these countries, orders, notes, or securities for payment of money, English or foreign, stamps, maps,<sup>11</sup> writings, title-deeds, paintings, but not coloured designs for commercial purposes,<sup>12</sup> engravings, including prints and coloured prints, pictures, including frames,<sup>13</sup> gold or silver plate or plated articles, including looking-glasses, smelling-bottles, and the like,<sup>14</sup> glass, china, silks in a

<sup>1</sup> *Campbells v. North British Rly. Co.*, 1875, 2 R. 433 ; *M'Queen v. Great Western Rly. Co.*, 1875, L.R. 10 Q.B. 569.

<sup>2</sup> *Vaughton v. London and North-Western Rly. Co.*, 1874, L.R. 9 Ex. 93.

<sup>3</sup> *Morriss v. North-Eastern Rly. Co.*, 1876, 1 Q.B.D. 302.

<sup>4</sup> *Treadwin v. Great Eastern Rly. Co.*, 1868, L.R. 3 C.P. 308.      <sup>5</sup> Carriers Act, 1830, s. 9.

<sup>6</sup> *Doyle v. London and North-Western Rly. Co.*, [1919] 1 K.B. 623.

<sup>7</sup> 17 & 18 Vict. c. 31.

<sup>8</sup> 11 & 12 Geo. V. c. 55, s. 56 and Sixth Schedule.

<sup>9</sup> *Bernstein v. Baxendale*, 1859, 6 C.B. (N.S.) 251.

<sup>10</sup> *Stoessiger v. South-Eastern Rly. Co.*, 1854, 3 E. & B. 549.

<sup>11</sup> *Wyld v. Pickford*, 1841, 8 M. & W. 443.

<sup>12</sup> *Woodward v. London and North-Western Rly. Co.*, 1878, L.R. 3 Ex. D. 121.

<sup>13</sup> *Henderson v. London and North-Western Rly. Co.*, 1870, L.R. 5 Ex. 90.

<sup>14</sup> *Owen v. Burnett*, 1834, 3 L.J. Ex. 76 ; *Bernstein, supra*.



manufactured or unmanufactured state, and whether wrought up or not with other materials,<sup>1</sup> furs, and lace. This was amended by the Carriers Act Amendment Act, 1865,<sup>2</sup> so as not to include machine-made lace.

SUBSECTION (8).—*The Rights of the Carrier.*

44. The carrier is entitled to be paid a reasonable hire, but apart from statute he is not bound to charge all persons equally.<sup>3</sup> It is a question of construction of the contract whether the consignor or consignee is liable for the hire. The carrier is entitled also to payment of expenses necessarily incurred by him to preserve the goods from extraordinary perils not properly arising from the duty of ordinary carriage. He has a right of retention over every parcel of goods carried by him, but for the hire of carriage only; it is a right of special and not of general retention, confining the right to retain to the securing the freight for that particular journey of the article retained.<sup>4</sup> Certain English cases seem to decide that a right to retain for a general balance may be established in favour of a carrier by usage or by special agreement, though not so as to affect third parties.<sup>5</sup> Such an agreement seems inconsistent with the position of a common carrier, who is bound to take for conveyance all goods brought to him by the public, and has been held not to be "reasonable" in the sense of the Railway and Canal Traffic Act.<sup>6</sup> If the goods are separable so that delivery of part would not infer abandonment of the right of retention, a carrier may be bound to deliver the goods to the extent to which his fare has been paid.<sup>7</sup>

SUBSECTION (9).—*The Consignee.*

45. The primary duty of the consignee is to take delivery. When goods are delivered by a carrier at the proper place and at the proper time, it is the duty of the consignee to examine them and ascertain if they are in good order, and if he does not intimate objection without delay, it will be presumed that the goods were delivered in good order.<sup>8</sup> But breaking bulk without notice to the carrier does not of itself bar a claim of damages.<sup>9</sup> Where a machine was injured in transit it was held that the consignee was not bound to take delivery along with the estimated amount for repairing it, but was entitled to reject it and claim its value at the place and time of delivery.<sup>10</sup> If a consignee

<sup>1</sup> Repealed as regards railways by Railways Act, 1921, s. 56 and Sixth Schedule.

<sup>2</sup> 28 & 29 Vict. c. 94. <sup>3</sup> *Branley v. South-Eastern Rly. Co.*, 1862, 31 L.J., C.P. 286.

<sup>4</sup> *Stevenson v. Likly*, 1824, 3 S. 291.

<sup>5</sup> *Rushforth v. Hadfield*, 1805, 6 East, 519; 1806, 7 East, 224.

<sup>6</sup> *Scottish Central Railway v. Ferguson & Co.*, 1864, 2 M. 781; *Peebles v. Caledonian Rly. Co.*, 1875, 2 R. 346; as to competition of carrier's right of retention with vendor's right of stoppage in transit, see *United States Steel Products Co. v. South-Western Rly. Co.*, [1916] 1 A.C. 189.

<sup>7</sup> *Ex parte Cooper*, 1879, 11 Ch. D. 68.

<sup>8</sup> *Stewart v. North British R'y. Co.*, 1878, 5 R. 426.

<sup>9</sup> *Johnston & Sons v. Dove*, 1875, 3 R. 202. <sup>10</sup> *Dick v. East Coast Rlys.*, 1901, 4 F. 178.

causes expense through delay in taking possession of the goods, the charges connected therewith may in certain cases be debited against the consignor.<sup>1</sup>

46. If the consignee refuses to accept the goods or cannot be found, the carrier is liable for the safe custody and redelivery of the goods to the sender's order.<sup>2</sup> If the carrier fails to take proper care of the goods he may be liable to the owner even though the latter was in fault in not taking delivery at the proper time.<sup>3</sup> If the goods are not to be delivered at the place of business or residence of the consignee, the carrier is entitled as a rule to charge the consignee for keeping the goods after delivery should have been taken.<sup>4</sup>

47. If a consignee gives a general order to a carrier as to the delivery of goods to him, the carrier may ignore the general order and deliver the goods according to the address on the particular lots in his charge from time to time. But the consignee, in the absence of special circumstances, has the right to give to the carrier special directions superseding the address, and the carrier is bound to obey these directions if they involve no additional burden on him. Thus the consignee may elect to take delivery at the station or other point of arrival of the carrier.<sup>5</sup>

#### SECTION 4.—THE CARRIAGE OF PASSENGERS.

##### SUBSECTION (1).—*Nature of Contract.*

48. The carriage of passengers may be undertaken by special contract or it may be conducted as a public profession similar to that of a common carrier of goods. In the latter case, according to English decisions, the carrier may be a common carrier of passengers, but in respect that he is not a bailee of them he is not an insurer of their safety.<sup>6</sup> According to Scottish text writers, public carriers of passengers are not common carriers and are not insurers under the Edict, but are subject to certain of the obligations which attach to common carriers of goods.<sup>7</sup>

##### SUBSECTION (2).—*Duty of Carrier to receive Passengers.*

49. It is the duty of a carrier of passengers, who holds himself out to the public generally as such carrier, to receive all persons as passengers who offer themselves in a fit and proper state to be carried, provided the carrier has sufficient room in his conveyance, and the intending passengers are ready and willing to pay the proper and

<sup>1</sup> *Glasgow and South-Western Rly. Co. v. Polquhain Coal Co.*, 1916 S.C. 36.

<sup>2</sup> *Metzenburg v. Highland Rly. Co.*, 1869, 7 M. 919.

<sup>3</sup> *Mitchell v. Lancashire and Yorkshire Rly. Co.*, 1875, L.R. 10 Q.B. 256.

<sup>4</sup> *Great Northern Rly. Co. v. Swaffield*, 1874, L.R. 9 Ex. 132.

<sup>5</sup> *Wannan v. Scottish Central Rly. Co.*, 1864, 2 M. 1373; *Pickford v. Caledonian Rly. Co.*, 1866, 4 M. 755; *Menzies v. Caledonian Rly. Co.*, 1887, 5 Rly. & Can. Ca. 306.

<sup>6</sup> *Clark v. West Ham Corporation*, [1909] 2 K.B. 858 at 876.

<sup>7</sup> Bell, Prin. s. 160A.

reasonable fare, and to conform to reasonable regulations as to carriage.<sup>1</sup> A carrier of passengers may demand and receive his fare at the time when the passenger engages his seat, and if he refuses to pay it, the carrier may fill up his place with another who is ready to make the proper deposit.<sup>2</sup> The position of railway companies as passenger carriers is different, their right to demand prepayment being regulated by the Railways Act, 1921, as from the "appointed day."

SUBSECTION (3).—*Duty to provide reasonable Accommodation.*

50. A passenger is entitled, in the absence of express contract, to reasonable and usual accommodation, and what is reasonable in the case of public carriage has been fixed by statute. In the same way the number of passengers who may be carried is limited, and overcrowding is a punishable offence.<sup>3</sup> If overcrowding, or failure to have a sufficient staff to prevent it, results in damage, the carrier is liable civilly.<sup>4</sup> The carrier, however, may limit his liability by special contract, and, as in the case of goods, this may be done by the issue of a ticket specifying the conditions of carriage either expressly or by incorporating or referring to some other document containing the conditions.<sup>5</sup>

SUBSECTION (4).—*Taking up and setting down Passengers.*

51. A public carrier of passengers is bound to convey passengers from the usual place of taking up to the usual place of setting down; and similarly, because the contract is to carry from the point of taking up to the place of setting down, a passenger cannot in the absence of special stipulation insist on breaking his journey, even though he may have to leave the vehicle temporarily, as in changing at a junction. The rule is the same whether the journey is by road as in a tramway,<sup>6</sup> or by rail.<sup>7</sup> A passenger is entitled to be carried to his destination within a reasonable time. The obligation is not absolute, unless the carrier gives a definite undertaking, but is merely to use all reasonable diligence.

SUBSECTION (5).—*Duty to Convey carefully.*

52. A public carrier of passengers does not insure their safety as a common carrier does of goods, but he is bound to shew a sufficient degree of care and forethought for their carriage without personal injury. The degree of care is very high.<sup>8</sup> The liability for failure in this duty does not depend on contract; it extends to protect anyone

<sup>1</sup> *Clark, supra.*

<sup>2</sup> *Ker v. Mountain*, 1793, 1 Esp. 27.

<sup>3</sup> *Lawson v. Macgregor*, 1924 J.C. 112; 1924, S.L.T. 609.

<sup>4</sup> *Metropolitan Rly. Co. v. Jackson*, 1877, 3 App. Ca. 193.

<sup>5</sup> *Hood v. Anchor Line, Ltd.*, 1918 S.C. (H.L.) 143; 1918, 2 S.L.T. 118.

<sup>6</sup> *Bastable v. Metcalf*, [1906] 2 K.B. 288.

<sup>7</sup> *Ashton v. Lancashire and Yorkshire Rly. Co.*, [1904] 2 K.B. 313.

<sup>8</sup> *Bell*, Prin. s. 170.



who is permitted to travel. The only duty, however, which the carrier owes to a trespasser, *e.g.* a stowaway, is to avoid wilful injury.<sup>1</sup> The obligation includes also the duty of taking similar care of those allowed on the carrier's premises to accompany passengers or to meet them.<sup>2</sup>

53. The carrier is responsible for all except latent defects which could not by any reasonable diligence or skill be discovered. He undertakes that human life will be protected so far as possible, and with this in view, that not only shall the means of carriage be as efficient as possible under proper examination, but that all accessories of carriage shall be equally so. He also undertakes the sufficiency of his servants in capacity, knowledge, and care.<sup>3</sup> His duty also extends to providing a safe access to and egress from the place of carriage. Failure to take reasonable precautions against danger, as where a footbridge was not provided for passengers crossing a railway line, may place a heavy onus on the carrier.<sup>4</sup>

54. Whether there has been a failure of duty depends on circumstances. Thus, stopping a vehicle at a platform may be an invitation to alight, involving a duty to allow passengers sufficient time for that purpose.<sup>5</sup> A carrier, however, such as a railway company, is not bound to see that a drunk person carried by him gets safely off the premises.<sup>6</sup> The onus of proof of negligence is on the person alleging it, but the onus is easily shifted to the carrier by the occurrence of an accident. A breakdown is *prima facie* evidence of negligence which the carrier is bound to rebut. So also collision with a mail-bag carrier has been held to put the burden on the railway company to prove absence of negligence.<sup>7</sup> The mere fact of being snowed up and injury being sustained thereby does not raise any presumption of fault against the carrier.<sup>8</sup> Where a carrier adopts the best known equipment, keeps it in order and works it without negligence, there is no liability should a rare and unexpected accident occur.<sup>9</sup>

· SUBSECTION (6).—*Carrier's Liability on Failure to Convey to Destination.*

55. In the event of the carrier's failure to convey his passenger to his destination, the passenger is entitled to the expense of getting there by other means or to compensation for the trouble and inconvenience of walking if there be no other way of reaching the end of

<sup>1</sup> *Grand Trunk Rly. of Canada v. Barnett*, [1911] A.C. 369.

<sup>2</sup> *Tough v. North British Rly. Co.*, 1914 S.C. 291; 1914, 1 S.L.T. 121.

<sup>3</sup> *Gray v. Caledonian Rly. Co.*, 1912 S.C. 339; 1912, 1 S.L.T. 76; *Fowler v. North British Rly. Co.*, 1914 S.C. 866; 1914, 2 S.L.T. 95.

<sup>4</sup> *Thomson v. North British Rly. Co.*, 1876, 4 R. 115.

<sup>5</sup> *Aitken v. North British Rly. Co.*, 1891, 18 R. 836; *Abbot v. North British Rly. Co.*, 1916 S.C. 306; 1916, 1 S.L.T. 60.

<sup>6</sup> *McCormick v. Caledonian Rly. Co.*, 1904, 6 F. 362.

<sup>7</sup> *Pirie v. Caledonian Rly. Co.*, 1890, 17 R. 1157.

<sup>8</sup> *Mathieson v. Caledonian Rly. Co.*, 1903, 5 F. 511.

<sup>9</sup> *Newberry v. Bristol Tramways and Carriage Co., Ltd.*, 1912, 107 L.T. 801.



his journey. The basis of the contract of carriage of a passenger is that he should reach his destination. But the passenger is not entitled to adopt unusual or extravagant means of completing his journey. He is only entitled, in respect that the other party has not performed his contract, to do so for him as nearly as may be, and charge him for the reasonable expense in so doing; and the proper test of what is reasonable where a carrier fails to complete his journey and the passenger has to do so for himself, is to consider whether, according to the ordinary habits of society, a person delayed on his journey for reasons unconnected with the carrier would have incurred the expense sought to be charged. The passenger should complete the journey in the way he would have done if he had to bear the expense himself, *e.g.* he is not entitled to engage a special train.<sup>1</sup>

56. The carrier is not liable to pay damages for an accidental injury or illness due to delay or failure in reaching the agreed-on destination. Such consequences are too remote. The same rule would exclude a claim to compensation for loss due to the passenger's being prevented from attending to business engagements.<sup>2</sup> If the proximate cause of injury is the act of someone for whom the carrier is not responsible, there is no liability against him.<sup>3</sup>

#### SUBSECTION (7).—*Statutory Regulations for Carriage of Passengers.*

57. The common law of carriage of passengers has been modified by various statutes, particularly the Stage Carriages Act, 1832,<sup>4</sup> the Railway Passenger Duty Act, 1842,<sup>5</sup> the Revenue Act, 1869,<sup>6</sup> the Burgh Police Act, 1892,<sup>7</sup> the Motor Car Acts, 1896 and 1903,<sup>8</sup> and the Roads Act, 1920,<sup>9</sup> as well as various municipal statutes and special Acts. Carriage of passengers by railway is subject to the provisions of the various railway statutes. Carriage under the first of these Acts refers to public carriage by stage carriages, which are defined to be those drawn or impelled by animal power used for conveying passengers for hire to or from any place in Great Britain at a rate greater than three miles an hour, where each passenger pays a separate and distinct fare. This definition was repealed by the Revenue Act, 1869, and a Stage Carriage is now held to be a carriage "which plies from one stage to another for the conveyance of passengers who pay a fare or hire for their seat or room" in it.<sup>10</sup> A motor omnibus is a stage carriage within the Railway Passenger Duty Act, 1842.<sup>11</sup>

<sup>1</sup> *Le Blanche v. London and North-Western Rly. Co.*, 1876, L.R. 1 C.P.D. 286.

<sup>2</sup> *Hobbs v. London and South-Western Rly. Co.*, 1875, L.R. 10 Q.B. 111; "*Den of Ogil*" *Co. v. Caledonian Rly. Co.*, 1902, 5 F. 99.

<sup>3</sup> *M'Callum v. North British Rly. Co.*, 1908 S.C. 415; 15 S.L.T. 727.

<sup>4</sup> 2 & 3 Will. IV. c. 20; 3 & 4 Will. IV. c. 48.

<sup>5</sup> 5 & 6 Vict. c. 79.

<sup>6</sup> 32 & 33 Vict. c. 14; *cf.* 47 & 48 Vict. c. 25.

<sup>7</sup> 55 & 56 Vict. c. 55.

<sup>8</sup> 3 Edw. VII. c. 36.

<sup>9</sup> 10 & 11 Geo. V. c. 72.

<sup>10</sup> *Smith v. Mackintosh*, 1926 J.C. 15; 1926, S.L.T. 21.

<sup>11</sup> *Lawson v. Macgregor*, 1924 J.C. 112; *Smith v. Mackintosh*, *supra*.

58. Proprietors of stage carriages must be licensed, and they must have their name and the number of passengers it is entitled to carry legibly printed on the vehicle; and certain provisions are made for the safety of passengers. By s. 37 of the Stage Carriages Act, the taking of outside passengers and of luggage is confined to coaches of a certain size, and by s. 43 the height to which the luggage may be packed is also limited. Provision is also made for measuring the carriage and the luggage and counting the passengers during the journey (s. 45). Penalties are imposed upon a driver who quits the box before a fit and proper person has the reins or stands at the horses' heads, or who permits any person to drive, and upon either a driver or conductor who neglects to take due care of luggage or asks more than the proper fare or charge for luggage, or who through intoxication or negligence, or by wanton or furious driving, or by or through any other misconduct endangers the safety of any passenger or other person (s. 47). The owner is liable for these penalties where the driver or conductor cannot be found.

59. The Railway Passenger Duty Act, 1842, imposes penalties for carrying a greater number of passengers than that for which the carriage is constructed, and standardises the number by lineal measurement of the sitting accommodation provided. The statutory provisions as to the number which may be carried refer to the sitting accommodation in the vehicle.<sup>1</sup>

60. The Roads Act, 1920,<sup>2</sup> contains provisions as to the licensing of vehicles used as public conveyances of passengers, and amends the Motor Car Acts, 1896 and 1903, and the Finance Act, 1920. Where, upon application for a licence to ply for hire with an omnibus, the licensing authority either refuses to grant a licence or grants a licence subject to conditions, in either case the applicant has a right of appeal to the Minister of Transport from the decision of the licensing authority, and the Minister shall have power to make such order thereon as he thinks fit, and such order shall be binding upon the licensing authority. The order is final and not appealable to any court of law. For the purpose of this provision the expression "omnibus" includes every omnibus, char-à-banc, waggonette, brake, stage-coach, or other carriage plying for hire or used to carry passengers at separate fares.<sup>3</sup> The Act expressly excludes tram cars from most of its provisions.

#### SUBSECTION (8).—*Carriage by Tramway.*

61. Tramways are regulated by the Tramways Act, 1870,<sup>4</sup> and various special Acts. Under s. 51 of the general statute, if any person travelling or having travelled in any carriage on any tramway avoids or attempts to avoid payment of his fare, or if any person having paid

<sup>1</sup> *Lawson v. Macgregor*, *supra*.

<sup>2</sup> 10 & 11 Geo. V. c. 72, and see *Burgh Police (Scotland) Act*, 1892, s. 270.

<sup>3</sup> *Ibid.*, s. 14.

<sup>4</sup> 33 & 34 Vict. c. 78.

his fare for a certain distance knowingly and wilfully proceeds in any such carriage beyond any such distance and does not pay the additional fare for the additional distance, or attempts to avoid payment thereof, or if any person knowingly and wilfully refuses or neglects on arriving at the point to which he has paid his fare to quit such carriage, he shall be liable to a penalty. No conviction is competent under this section unless it is proved that the passenger acted with fraudulent intention.<sup>1</sup> Where a tramway company is bound by its private Act to run cars for workmen at reduced fares and allows a passenger to travel thereon who is not a workman, they cannot charge him more than the reduced fare.<sup>1</sup>

62. The servants of a tramway company have statutory powers to seize and detain any person contravening s. 51 whose name or residence is unknown to them. If a tramway employee exceeds his powers under a genuine but mistaken belief as to what his duties are under the statute, his employers are liable for his actings.<sup>2</sup> Like other public carriers, they are bound to carry any passenger, not being an objectionable person, who offers himself and is willing to pay the published fare, provided they have accommodation for him. They are not entitled to impose a condition limiting their liability for negligence in the performance of their duties without giving the passenger the option of travelling at a higher fare without any such condition.<sup>3</sup> They may, subject to their special Acts, undertake incidentally to their main business the duties of common carriers of parcels.<sup>4</sup>

#### SUBSECTION (9).—*Hackney Carriages and Stage Coaches.*

63. A hackney carriage is one which a person takes for his exclusive use or for the use of himself and such other persons as he chooses to take with him in the carriage, and he is entitled to go with it to any place within the prescribed distance which he thinks proper. A stage-coach or other public conveyance of that nature is a coach which runs regularly between stated places and along a stated route, and takes all and sundry at a fixed price, a separate fare being paid for each passenger, the passenger having no right to object to any other passenger or any number of other passengers who are carried on the coach, so long as the authorised number only, or a reasonable number, are carried. A hackney carriage is a *unum quid*, and the hirer may direct its course as he pleases. In a stage-coach the individual seats are let to individual passengers, each of whom pays a separate hire.<sup>5</sup> This distinction is not uniform in all statutory enactments, but it is in accordance with the Burgh Police (Scotland) Act, 1892,<sup>6</sup> which by

<sup>1</sup> *Nimmo v. Lanarkshire Tramways Co.*, 1912 S.C. (J.) 23.

<sup>2</sup> *Percy v. Glasgow Corporation*, 1922 S.C. (H.L.) 144; 1922, S.L.T. 352.

<sup>3</sup> *Clarke v. West Ham Corporation*, [1909] 2 K.B. 855.

<sup>4</sup> *Attorney General v. Manchester Corporation*, [1906] 1 Ch. 643.

<sup>5</sup> *Craik v. Wood*, 1921 S.C. (J.) 27, per L.J. Clerk. <sup>6</sup> 55 & 56 Vict. c. 55.



s. 270 and Schedule V. lays down a code of regulations (which may be altered by the magistrates with the approval of the sheriff) for hackney carriages plying for passengers in burghs. Five of the largest towns, Edinburgh, Glasgow, Aberdeen, Dundee, and Greenock, are not controlled by the provisions of this Act, but they have in the Police Acts applicable to them somewhat similar provisions.

64. The Burgh Police (Scotland) Act, 1892, provides for the licensing of such carriages and of their drivers, and for the control, suspension, and revocation of the licences. A licensed driver must not refuse without reasonable excuse to drive within the limits prescribed by the magistrates; he cannot demand more than the legal fare, and any agreement to pay more is not only not binding, but any sum paid beyond the proper fare may be recovered. Refusal by a hirer to pay the proper fare may involve a penalty. The magistrates may make by-laws for fixing fares, distances, stances, and the like, as also for the safe custody and redelivery of any property accidentally left in hackney carriages, and for fixing the charges to be made in respect thereof. A contract made by a cabman in breach of the regulations does not bind his master. Thus, where a cabman contravened the regulations by carrying luggage for a party other than the one hiring the cab and lost the luggage, the value could not be recovered from the proprietor of the cab.<sup>1</sup>

65. Hackney coachmen do not fall under the Edict, *nautæ, cautiones*, etc., unless in very special circumstances.<sup>2</sup> In regard to luggage taken with the passenger, they are only liable for failure to shew such a reasonable degree of care as will prevent the owner of the goods sustaining loss through negligence or fault. This liability seems the same whether a charge is made for luggage or not.<sup>3</sup> They are otherwise in the same position as other carriers of passengers.

#### SECTION 5.—CARRIAGE OF PASSENGERS' LUGGAGE.

66. The obligations of a public carrier of passengers with respect to the passengers' luggage are the same as those of a common carrier during the transit.<sup>4</sup> He is an insurer of its safety subject to the exceptions already noted. This applies, however, to the full extent only when the luggage has been delivered to the carrier or his servants for carriage under the carrier's exclusive custody and control. If a passenger himself takes charge of it, as, *e.g.*, if he takes it into the carriage with him, the carrier is not liable as insurer if it is lost or damaged by the passenger's negligence. But if the loss is not sustained through such negligence, the carrier is liable.<sup>5</sup> The luggage continues at the

<sup>1</sup> *Ord v. Gemmell & Son*, 1898, 1 F. 17.

<sup>2</sup> Bell, Prin., s. 236 seems to have limited application.

<sup>3</sup> *Ross v. Hill*, 1846, 2 C.B. 877.

<sup>4</sup> *Campbell v. Caledonian Rly. Co.*, 1852, 14 D. 806; *Great Western Rly. Co. v. Bunch*, 1868, 13 App. Ca. 31.

<sup>5</sup> *Macrow v. Great Western Rly. Co.*, 1871, L.R. 6 Q.B. 612 at 617.



carrier's risk except in so far as the passenger's fault or negligence contributes to its loss.<sup>1</sup> The liability does not extend to things entirely in control of the passenger, such as his watch or money in his pocket.

67. The liability commences as soon as the luggage has been placed in the hands of the carrier or of his servants if that is done for the purpose of putting it in transit.<sup>1</sup> It is not dependent on contract, and it is not affected by the fact that the passenger has not paid his fare or taken a ticket.<sup>2</sup> But delivery of luggage to a railway porter to look after without regard to putting it on the train is not sufficient delivery to make the carrier liable as insurer.<sup>3</sup> The liability continues until actual delivery to the passenger at the terminus. If the carrier is accustomed to take luggage to a cab if so required, he must do so. Delivery is not complete and his full liability continues until this is done.<sup>4</sup> Once the luggage is delivered to the carrier there is no duty on the passenger to see to it at junctions,<sup>5</sup> even though the carrier has accepted it without its being addressed.<sup>5</sup> The liability does not cease until the passenger has been afforded a reasonable time to claim the luggage at the end of the journey. Carriers carrying passengers' luggage have the benefit of the Carriers Act, 1830,<sup>6</sup> but a railway company is under the further restrictions of the Railway and Canal Traffic Act, 1854.<sup>7</sup>

68. A public carrier is bound to receive the normal amount of luggage allowed to a passenger, and if he allows the passenger to take, either on payment of excess or not, more than the stipulated amount, he is liable as a common carrier for the whole.<sup>8</sup> Passengers carried at reduced fares on excursion trains do not have the same rights in regard to luggage.

69. Where luggage is not claimed at the proper time, the carrier becomes liable only as a custodian. This also is his liability if he takes charge of luggage as left luggage, and he may qualify his liability by conditions duly communicated to the owner of the luggage.<sup>9</sup> If loss is due to failure of the carrier to deposit the goods in the left luggage office, he is liable, notwithstanding such conditions,<sup>10</sup> unless they clearly provide for such a case.<sup>11</sup> The liability of custodians may involve responsibility for the acts of their servants, irrespective of whether the latter are acting within the scope of their employment, as where the servant takes possession of the goods for a purpose of his own and they are lost or damaged while in his custody.<sup>12</sup>

<sup>1</sup> *Great Western Rly. Co. v. Bunch*, *supra*.

<sup>2</sup> *Jenkyns v. Southampton Steam Packet Co.*, [1919] 2 K.B. 135.

<sup>3</sup> *Great Western Rly. Co. v. Bunch*, *supra*.

<sup>4</sup> *Butcher v. London and South-Western Rly. Co.*, 1855, 24 L.J., C.P. 137.

<sup>5</sup> *Campbell v. Caledonian Rly. Co.*, 1852, 14 D. 806.

<sup>6</sup> *Macrow v. Great Western Rly. Co.*, 1871, L.R. 6 Q.B. 612.      <sup>7</sup> 17 & 18 Vict. c. 31.

<sup>8</sup> *Macrow*, *supra*.      <sup>9</sup> *Henderson and Others v. Stevenson*, 1875, 2 R. (H.L.) 71.

<sup>10</sup> *Handon v. Caledonian Rly. Co.*, 1880, 7 R. 966.

<sup>11</sup> *Lyons v. Caledonian Rly. Co.*, 1909 S.C. 1185; 1909, 2 S.L.T. 78.

<sup>12</sup> *Central Motors (Glasgow), Ltd. v. Cessnock Garage and Motor Co.*, 1925 S.C. 796; 1925, S.L.T. 563.

70. A carrier's liability as insurer for personal luggage does not cover everything conveyed along with the passenger; it only applies to what is strictly speaking "luggage." A conclusive definition is impracticable; it includes such things as a passenger takes with him for his personal use or convenience according to the needs of the class to which he belongs.<sup>1</sup> It does not cover merchandise or materials intended for trade,<sup>2</sup> nor articles of furniture or household goods. Musical instruments, bicycles, and the like have been held not to be personal luggage. It depends on circumstances; thus the usual equipment of an officer in the army, including revolver and binoculars, has been held to be luggage.<sup>3</sup> Articles taken by the passenger other than personal luggage should be paid for separately; the carrier is not liable for such articles taken as luggage although they are labelled in such a way as to indicate their contents; the label does not charge the carrier with knowledge of the contents. The Railways Act, 1921, makes provision for determining what is "luggage" in the case of railway companies.<sup>4</sup>

#### SECTION 6.—CARRIAGE OF ANIMALS.

71. A carrier of animals may be a common carrier,<sup>5</sup> except that if the animal dies in course of transit his obligation as insurer does not cover that loss.<sup>6</sup> The carrier is not responsible for loss or damage wholly attributable to inherent vice in the animal itself, such as vicious temper,<sup>7</sup> unless the vice is brought out by the negligence or fault of the carrier. If an animal is known by the carrier to be vicious, he is bound to take not only usual but extraordinary precautions to prevent it from doing injury to the public. If he has no such knowledge he is not liable for such injury should the animal escape.<sup>8</sup> Where animals are carried under a contract of special carriage, there is no liability except on the ground of negligence.

72. The carriage of animals is now mostly conducted by railway companies, who must by statute provide certain facilities. Before the Railway and Canal Traffic Act, 1854,<sup>9</sup> such companies, like other common carriers, could refuse to carry animals except on their own terms, but s. 2 of that Act compels them to provide reasonable facilities without adjecting unfair conditions limiting their liability. A common carrier of animals guarantees the sufficiency of his conveyance and of the accommodation for receiving and delivering them at the various stages

<sup>1</sup> *Macrow v. Great Western Rly. Co.*, 1871, L.R. 6 Q.B. 612 at 632.

<sup>2</sup> *Hudston v. Midland Rly. Co.*, 1871, L.R. 4 Q.B. 366.

<sup>3</sup> *Jenkyns v. Southampton Steam Packet Co.*, [1919] 2 K.B. 135.

<sup>4</sup> 11 & 12 Geo. V. c. 55, s. 28 (1).

<sup>5</sup> *Anderson v. North British Rly. Co.*, 1875, 2 R. 443.

<sup>6</sup> *Paxton v. North British Rly. Co.*, 1870, 9 M. 50.

<sup>7</sup> *Ralston v. Caledonian Rly. Co.*, 1878, 5 R. 671; *Nugent v. Smith*, 1876, 1 C.P.D. 423.

<sup>8</sup> *Gray v. North British Rly. Co.*, 1890, 18 R. 76.

<sup>9</sup> 17 & 18 Vict. c. 31.

of the journey.<sup>1</sup> As in the case of goods, the liability continues until delivery has been made or ought to have been taken. If there is no person to take delivery when the consignee knows or ought to have known that the animals have arrived, the carrier may put them into safe custody, as into a stable, and charge the expenses against the owner.<sup>2</sup>

73. A carrier may limit his liability by special contract, but in the case of railway companies this is regulated by s. 7 of the Railway and Canal Traffic Act, 1854, which limits the amount of compensation the company must pay unless the value of the animal has been declared prior to delivery to the carrier, in which case the company may demand an increased rate to cover the extra risk. The values set forth in the Act have been modified by the Railways Act, 1921.<sup>3</sup> This modification only takes place as from "the appointed day" under that Act. Under that Act "merchandise" includes live stock and animals of all descriptions unless the context otherwise requires. Where the contract of carriage exempts the carrier from certain liabilities, the exemption may cover loss sustained while the carrier is in breach of his duty by carrying the animals by another route than that agreed on.<sup>4</sup>

74. The conveyance of infected animals is regulated by the Diseases of Animals Act, 1894,<sup>5</sup> and orders thereunder, and the same Act provides for the due supply by the carrier of food and water to animals during their journey.<sup>6</sup> See ANIMALS.

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<sup>1</sup> *Blower v. Great Western Rly. Co.*, 1872, L.R. 7 C.P. 655.

<sup>2</sup> *Great Northern Rly. Co. v. Swaffield*, 1874, L.R. 9 Ex. 132.

<sup>3</sup> Sec. 56, subs. (1), and Sixth Schedule.

<sup>4</sup> *Lord Polwarth v. North British Rly. Co.*, 1908 S.C. 1275; 15 S.L.T. 461.

<sup>5</sup> 57 & 58 Vict. c. 57.

<sup>6</sup> *Howman v. Orkney Steam Navigation Co., Ltd.*, 1899, 1 F. (J.) 55.

# CARRIAGE BY SEA.

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## PART I.—CARRIAGE OF GOODS.

## SECTION 1.—INTRODUCTION.

75. The first part of this article deals with the contract of carriage of goods by sea, as the law stood before the passing of the Carriage of Goods by Sea Act, 1924.<sup>1</sup> This method has been adopted for the reason that the Act only applies in relation to and in connection with the carriage of goods in ships carrying goods from any port in Great Britain or Northern Ireland to any other port whether in or outside Great Britain or Northern Ireland, and its scope is otherwise restricted. The provisions of the Act are considered separately in Part II. References will be found throughout to the Act where its provisions affect the common law. The provisions of the Act of Congress of 1893, known as the Harter Act, and of certain Acts of British Dominions which restrict the freedom of the contract of carriage of goods by sea are also dealt with in Part II.

## SECTION 2.—GENERAL SHIP.

SUBSECTION (1).—*Definition*.

76. The contract for the conveyance of merchandise in a general ship is that by which the master and owners of a ship, destined on a particular voyage, engage with various merchants, unconnected with each other, to convey their respective goods to the place of the ship's destination.<sup>2</sup> It is the pure contract *locatio operis mercium vehendarum*.

When a ship is destined to be thus employed, the fact is usually made known to merchants and to the public by advertisement. The shipowner in the case of a general ship is a common carrier.<sup>3</sup> He is bound to take whatever goods are offered,<sup>4</sup> if there is room and the goods are of the kind which he professes to carry.<sup>5</sup> He may refuse to

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GENERAL AUTHORITIES.—Carver on Carriage by Sea, 7th ed.; Scrutton on Charter-Parties and Bills of Lading, 12th ed.; Abbott on Merchant Ships, 5th ed.; Arnould on Marine Insurance, 11th ed.

<sup>1</sup> 14 & 15 Geo. V. c. 22.

<sup>2</sup> Abbott, Merchant Ships, 5th ed., 212.

<sup>3</sup> Bell, Prin. s. 411; *Nugent v. Smith*, 1876, L.R. 1 C.P.D. 19, 423.

<sup>4</sup> Bell, Prin. ss. 74, 412.

<sup>5</sup> Bell, Prin. s. 159; *Johnson v. Midland Rly. Co.*, 1849, 18 L.J. (N.S.) Ex. 366.

take dangerous goods.<sup>1</sup> Although a vessel is on charter, if she is put up by the master as a general ship and the charter is unknown to the shipper, she is to be regarded as a general ship.<sup>2</sup>

#### SUBSECTION (2).—*Contract of Affreightment.*

77. The agreement for the carriage of goods, called the contract of affreightment, may be proved by parole.<sup>3</sup> It is sometimes completed by the mere acceptance on the part of the shipper of the terms of the shipowner's advertisement.<sup>4</sup> More commonly there is a special contract between the shipper and the shipowner, or his representative. The parties may make any stipulations they please, modifying their common-law obligations. Such stipulations or conditions are usually embodied in the bill of lading, which serves the double purpose of a receipt by the master of the ship for the goods, and a document preserving evidence of the terms of the contract.<sup>5</sup>

#### SUBSECTION (3).—*Obligations of Parties.*

78. In the absence of express stipulations, the obligations of parties to the contract of affreightment in a general ship to which the Carriage of Goods by Sea Act, 1924, does not apply, may be summarised as follows:—

The shipowner undertakes—

1. That the ship is capable of receiving the sort of cargo for which she is engaged.<sup>6</sup>

2. That the goods will be received on board with care and skill, and properly stowed.<sup>7</sup>

3. That the ship shall be seaworthy, that is to say, that she shall be tight, staunch, and strong, properly manned, and provided with all necessary stores, and in all respects fit for the intended voyage,<sup>8</sup> The obligation to have all necessary stores includes the necessary ship's

<sup>1</sup> Merchant Shipping Act, 1894, s. 448.

<sup>2</sup> *The "Figlia Maggiore,"* 1868, L.R. 2 A. & E. 106.

<sup>3</sup> *Rederi Aktiebolaget Nordstjernen v. Salvesen & Co.*, 1903, 6 F. 64, opinion of Lord Moncreiff at p. 75.

<sup>4</sup> *Stewart v. Johnston*, 17th Jan. 1810, F.C.; *Wood & Co. v. G. & J. Burns*, 1893, 20 R. 602.

<sup>5</sup> See para. 131 *et seq.*

<sup>6</sup> Bell, Com. i. 548; Abbott, 5th ed., 224; *Stanton v. Richardson*, 1872, L.R. 7 C.P. 421; 1874, 9 C.P. 390; affd. (H.L.) 3 Asp. M.C. (N.S.) 23; *Tattersall v. National Steamship Co.*, 1884, L.R. 12 Q.B.D. 297.

<sup>7</sup> Bell, *ut supra*; Abbott, *ut supra*; *Blaikie v. Stembridge*, 1859, 28 L.J.C.P. 329, per Willes, J., at p. 331; *The "Freedom,"* 1871, L.R. 3 P.C. 594; *Union Castle Co. v. Borderdale Shipping Co.*, [1919] 1 K.B. 612.

<sup>8</sup> Bell, Com. i. 549; *Lyon v. Mells*, 1804, 5 East, 428; *Wilkie v. Geddes*, 1815, 3 Dow, 57; *Steel & Craig v. State Line S.S. Co.*, 1877, 4 R. (H.L.) 103; *Gilroy, Sons & Co. v. Price & Co.*, 1892, 20 R. (H.L.) 1; *Thin v. Richards & Co.*, [1892] 2 Q.B. 141; *Nobel's Explosives Co. v. Jenkins & Co.*, [1896] 2 Q.B. 326; *Luke & Co. v. Whitstable Shipping Co.*, 1897, 4 S.L.T. 328; *The "Vortigern,"* [1899] P. 140; *Weir v. Union Steamship Co.*, [1900] A.C. 525; *The "City of Lincoln,"* [1904] A.C. 250; see Seaworthiness *infra*, para. 193 *et seq.*

papers.<sup>1</sup> The ship must not be overloaded; <sup>2</sup> nor may the master in time of war take on board any contraband goods, whereby the ship and cargo might be liable to forfeiture or detention.<sup>3</sup>

4. That the ship shall be ready to sail at the agreed-upon or advertised time.<sup>4</sup>

5. That the ship, when ready, shall sail without undue delay.<sup>5</sup>

6. That the master will prosecute the voyage by the shortest and most direct course consistent with safety and the usual practice, and will navigate the ship with skill and care.<sup>6</sup> Accordingly deviation from the course of the voyage is not permitted, unless in case of necessity,<sup>7</sup> or for the purpose of saving life.<sup>8</sup> The master must complete the voyage: in case of accident to the ship he is not entitled to abandon the ship, but must prosecute the voyage if reasonably possible.<sup>9</sup> As to the cargo owner's rights in case of abandonment, see *Rose v. Singleton, Birch & Sons*.<sup>10</sup>

7. That the highest degree of care will be taken of the goods during the voyage, and reasonable exertion used for preserving them if damaged.<sup>11</sup>

8. That the goods will be delivered in good condition at the port of delivery,<sup>12</sup> if reasonably possible.<sup>13</sup> The manner of delivery is regulated, in the absence of agreement, by the custom of the port.

#### SUBSECTION (4).—*Edict Nautæ, Caupones, Stabularii.*

79. The responsibility of the shipowner for the safety of the goods under his charge is grounded in our law upon the edict NAUTÆ, CAUPONES, STABULARII, the rule of which is that the persons comprehended under it being once chargeable with goods, they must answer for their restitution in the same condition, unless the goods have perished or suffered

<sup>1</sup> *Levy v. Costerton*, 1816, 1 Stark. 212.

<sup>2</sup> Bell, Com. i. 548; Abbott, 224.

<sup>3</sup> Abbott, *ut supra*; *Dunn v. Bucknall Bros.*, *Dunn v. Currie & Co.*, [1902] 2 K.B. 614.

<sup>4</sup> *Shadforth v. Higgin*, 1813, 3 Camp. 385; *Jackson v. Union Marine Insurance Co.*, 1874, L.R. 10 C.P. 125; but see *Donaldson Bros. v. Little & Co.*, 1882, 10 R. 413.

<sup>5</sup> Bell, Com. i. 553; *Tennent v. Carmichael*, 1843, 5 D. 639; *The "Wilhelm"*, 1866, 2 Mar. Ca. 343; see also *The "San Roman"*, 1872, L.R. 5 P.C. 301.

<sup>6</sup> Bell, Com. i. 554; Abbott, 239; *Turnbull v. Black & Rankins*, 1799, Hume, 300.

<sup>7</sup> *Phelps, James & Co. v. Hill*, [1891] 1 Q.B. 605.

<sup>8</sup> *Lavabre v. Wilson*, 1779, 1 Doug. 284; *Stewart v. Johnston*, 17th Jan. 1810, F.C.; *Davis v. Garrett*, 1830, 6 Bing. 716; *The "Teutonia"*, 1872, L.R. 4 P.C. 171; *Scaramanga & Co. v. Stamp*, 1880, 5 C.P.D. 295; *Balian v. Joly*, 1890, 6 T.L.R. 345; *Glynn v. Margetson & Co.*, [1893] A.C. 351; *J. Thorley, Ltd. v. Orchis Steamship Co., Ltd.*, [1907] 1 K.B. 660; *Internationale Guano en Superphosphaat Werken v. Macandrew & Co.*, [1909] 2 K.B. 360; *Kish v. Taylor*, [1912] A.C. 604; see INSURANCE (MARINE).

<sup>9</sup> *Assicurazioni Generali v. S.S. "Bessie Morris" Co.*, [1892] 2 Q.B. 652.

<sup>10</sup> 1908, 16 S.L.T. 372, opinion of Lord Salvesen and cases there cited

<sup>11</sup> *Notara v. Henderson*, 1870, L.R. 5 Q.B. 346; 1872, 7 Q.B.D. 225; *Adam v. J. & D. Morris*, 1890, 18 R. 153; *The "Savona"*, [1900] P. 252.

<sup>12</sup> Bell, Com. i. 557.

<sup>13</sup> See *Nobel's Explosives Co. v. Jenkins & Co.*, [1896] 2 Q.B. 326; *Iredale v. China Traders' Ins. Co.*, [1900] 2 Q.B. 515.

injury by the King's enemies or inevitable physical accident.<sup>1</sup> The onus is upon the shipowner to shew that they have so perished or suffered injury.<sup>2</sup> In case of damage the condition in which the goods were received on board is matter for proof; there is no presumption, in the absence of a bill of lading acknowledgment, that they were received in good condition.<sup>3</sup>

80. That the goods the shipowner has undertaken to carry have been captured by the King's enemies, or have perished or been damaged by a peril of the sea, frees the shipowner completely from responsibility for breach of any of the obligations enumerated. The question what is a peril of the sea then becomes one of great importance. The subject is too large to be discussed here, and reference is made to Abbott.<sup>4</sup> A good illustration of what is not, and what is, a peril of the sea is to be found in this: it has been decided that damage done to cargo by rats is not a peril of the sea,<sup>5</sup> whereas if rats eat through a pipe, thereby causing sea-water to come in and damage the cargo, the damage is held to be caused by a peril of the sea.<sup>6</sup> Capture by pirates is a peril of the sea.<sup>7</sup> Theft is not,<sup>8</sup> nor is loss by scuttling on the owner's instructions.<sup>9</sup> Fire is not, at common law.

#### SUBSECTION (5).—*Statutory Limitations of Liability.*

81. The responsibility of the shipowner has, however, been limited by statute, and this limitation is not affected by the provisions of the Carriage of Goods by Sea Act, 1924. The shipowner is not responsible for loss by fire,<sup>10</sup> but he must prove that the loss occurred without his fault or privity.<sup>11</sup> He is not responsible for the loss of gold, silver, diamonds, watches, jewels, or precious stones, the true nature and value of which have not been declared.<sup>12</sup> He is not responsible for loss or damage to goods, when the loss occurs without his actual fault or privity, to a greater amount than eight pounds for each ton of the ship's tonnage.<sup>13</sup> If claims for damage exceed this amount, the shipowner may apply to the

<sup>1</sup> Bell, Com. i. 559.

<sup>2</sup> *Horsley v. Grimond*, 1894, 21 R. 410; *Smith v. Bedouin Steam Navign. Co.*, 1895, 23 R. (H.L.) 1.

<sup>3</sup> *Crawford & Law v. Allan Line S.S. Co.*, 1911 S.C. 791.

<sup>4</sup> Part iii. ch. 4; also Carver, 7th ed., 585 *et seq.*; *The "Xantho"*, 1887, L.R. 12 App. Ca. 503; *Stott (Baltic Steamers, Ltd.) v. Marten*, [1916] 1 A.C. 304.

<sup>5</sup> *Laveroni v. Drury*, 1852, 8 Ex. 166; *Kay v. Wheeler*, 1867, L.R. 2 C.P. 302.

<sup>6</sup> *Hamilton, Fraser & Co. v. Pandorf & Co.*, 1887, L.R. 12 App. Ca. 518; see also *The "Thrunscoc"*, [1897] P. 301.

<sup>7</sup> Abbott, 254; *Pickering v. Barkley*, 1649, 2 Rolle's Abridgment, 248; *Barton v. Wallford*, 1687, Comberbach, 56; Bell, Com. i. 559.

<sup>8</sup> Bell, Com. i. 470; *Molloy, De jure Maritimo*, ii. 3, 14; *Steinman & Co. v. Angier Line*, [1891] 1 Q.B. 619.

<sup>9</sup> *Samuel & Co. v. Dumas*, [1924] A.C. 431.

<sup>10</sup> Merchant Shipping Act, 1894, s. 502.

<sup>11</sup> *Lennards Carrying Co. v. Asiatic Petroleum Co.*, [1915] A.C. 705.

<sup>12</sup> Merchant Shipping Act, 1894, s. 502.

<sup>13</sup> *Ibid.*, s. 503.



Court to determine the amount of his liability, and the Court will distribute the amount rateably amongst the claimants.<sup>1</sup>

82. The obligations of the shipowner may be varied or displaced by express stipulation,<sup>2</sup> but in contracts to which the Carriage of Goods by Sea Act, 1924, applies, certain irreducible statutory liabilities contained in Article III. of the Rules appended to the Act are substituted for the common-law obligations, and these will be effective subject to the exceptions contained in Article IV. in so far as these exceptions are not dispensed with in the bill of lading (Article V.).

#### SUBSECTION (6).—*Obligation of Shipper.*

83. The obligation upon the shipper is to pay the freight and any average contribution for loss on the voyage.

#### SUBSECTION (7).—*Shipowner's Lien.*

84. The shipowner or master has a lien over the goods for freight. He has also a lien for average.<sup>3</sup> The saving of the lien is effected, although delivery of the goods may be given, by the consignee signing an average bond. But the shipowner or master cannot compel the consignee to sign a bond unreasonable in its terms.<sup>4</sup> The shipowner's right of retention does not extend to a general balance. He is not entitled to retain the goods for arrears of freight on other goods.<sup>5</sup>

### SECTION 3.—CHARTER-PARTY.

#### SUBSECTION (1).—*Preliminary.*

85. The contract of affreightment is rarely constituted by parole. In some cases—commonly in the coasting trade—its conditions are to be found in notices given by the shipowner of the terms on which he carries, and these, if brought clearly home to the merchant, are binding on the latter.<sup>6</sup> In many others the contract is evidenced by a bill of lading, which then to a large extent is in truth a charter; but bills of lading, particularly because of their negotiable character, have incidents of their own, and are separately treated. A charter-party, however, is

<sup>1</sup> Merchant Shipping Act, 1894, s. 504; see *Miller v. Powell*, 1875, 2 R. 976; *The "Victoria,"* 1888, 13 P.D. 125; *Rankine v. Raschen*, 1877, 4 R. 725; *Carron Co. v. Cayzer, Irvine & Co.*, 1885, 13 R. 114; see also *The "Crathie,"* [1897] P. 178; *Mersey Docks and Harbour Board v. Hay*, [1923] A.C. 345; and as to *forum*, *Hay v. Jackson & Co.*, 1911 S.C. 876.

<sup>2</sup> See Bill of Lading, *infra*.

<sup>3</sup> Bell, Prin. s. 1426; *Crooks v. Allan*, 1879, 5 Q.B.D. 38; *Huth v. Lamport*, 1886, 16 Q.B.D. 735; M.S. Act, 1894, s. 494 *et seq.*

<sup>4</sup> *Huth v. Lamport*, *supra*.

<sup>5</sup> *Stevenson v. Likly*, 1824, 3 S. 291. (As to the construction of the contract of affreightment and the rules when there is a conflict of laws, see paras. 88, 89, *infra*.)

<sup>6</sup> *Wood & Co. v. G. & J. Burns*, 1893, 20 R. 602; *e.g. contra*, see *Macrae (Lightbody's Tr.) v. J. & P. Hutchison*, 1886, 14 R. 4.

not only the leading form of writing by which the contract is constituted, but is almost always used when it is one for the use of the whole ship. It is therefore now proposed, under reference to the general law applicable to mutual contracts, to state shortly the principles regulating the contract of affreightment.

#### SUBSECTION (2).—*Parties.*

86. The parties are ordinarily the shipowner and a merchant or other person requiring the use of the ship. The master has authority to enter into charters for the use of the ship at a foreign port when the ship is seeking employment,<sup>1</sup> but he cannot innovate a charter already made,<sup>2</sup> though he can make arrangements in connection with its execution. Thus it has been held he cannot abandon a claim for demurrage, but can agree to give a certain extension of time for loading in return for abandonment by the merchant of his right to require the ship to go to extra ports to load.<sup>3</sup> The owner himself cannot make a charter of so unusual a character as to impair the security of a mortgagee of the ship.<sup>4</sup>

#### SUBSECTION (3).—*Stamp.*

87. The charter-party must be stamped with a sixpenny stamp, and even on payment of a penalty can only be after-stamped within a month after execution.<sup>5</sup>

#### SUBSECTION (4).—*Construction.*

88. The purport of the contract is generally to be ascertained in the usual way in the case of written contracts, and as in other mercantile contracts the construction to be applied will not be unnecessarily strict.<sup>6</sup> Its terms, if unambiguous, are to be given effect to. Where different parts of the instrument are contradictory of each other or ambiguous the whole of the document must be considered for the purpose of ascertaining the meaning.<sup>7</sup> In cases of contradiction written clauses will usually prevail over printed clauses.<sup>8</sup> Customs and usages of trade (e.g. those prevailing at the ports of loading and discharge) which regulate the performance of the contract but do not change its essential character are tacitly incorporated in the contract though not expressed

<sup>1</sup> See Carver, 7th ed., s. 42.

<sup>2</sup> *Strickland and Ors. v. Neilson & MacIntosh*, 1869, 7 M. 400.

<sup>3</sup> *Holman v. Peruvian Nitrate Co.*, 1878, 5 R. 657.

<sup>4</sup> See *The "Heather Bell,"* [1901] P. 272.

<sup>5</sup> Stamp Act, 1891, ss. 49–51.

<sup>6</sup> *The "Curfew,"* [1891] P. 131; *The "Nifa,"* [1892] P. 411; *Aktieselskabet Helios v. Ekman & Co.*, [1897] 2 Q.B. 83.

<sup>7</sup> *Elderslie S.S. Co. v. Borthwick*, [1905] A.C. 93; *Nelson Line v. Nelson & Sons*, [1908] A.C. 16.

<sup>8</sup> *Rovner S.S. Co. v. Love & Stewart*, 1916 S.C. (H.L.) 199.

in it.<sup>1</sup> The undernoted cases illustrate the nature of the proof necessary to establish a custom of a port.<sup>2</sup> Again, the conditions implied by law in the contract of affreightment must be displaced by express provision, or they also will be held to form part of the bargain.

89. Contracts are in the ordinary case construed according to the *lex loci contractus*; but when they are to be wholly performed elsewhere, the law of the place of performance may be applied. In each case, however, the question by what law the parties have agreed the contract shall be construed is one to be gathered from the whole circumstances of the case and the terms of the contract.<sup>3</sup> In contracts of affreightment the same rules apply, but the question is one of special difficulty. The contract may be made between a shipowner of one nationality and a merchant of another, for performance between countries to which neither belongs. The mode in which the loading and discharge are to be conducted may of course be affected, not only by the customs, but by the law of the place of performance. In general, the law of the ship's flag will regulate the authority of the shipmaster to make the contract, if he has done so, or to deal with the goods in the course of the voyage; and in the absence of other indications, it is thought that the primary implication will be that the parties intended to be bound by the law of the ship's flag and not by the *lex loci contractus*.<sup>4</sup> Where, however, an English merchant shipped goods in England to be carried to a Dutch port in a ship carrying the Dutch flag, but belonging to a company registered both in England and Holland, and the bill of lading was in English, it was held the law of England applied.<sup>5</sup> In certain cases, *e.g.* as to the probative effect of statements in a bill of lading, the *lex fori* will rule.<sup>6</sup>

#### SUBSECTION (5).—*Demise.*

90. In special cases, now rare, the owner parts with control and possession of the ship. The charterer takes his place, and he employs and pays the crew. In such a case, known as a demise, the owner, having lost possession, can claim no lien over the goods for freight. He incurs no legal obligation to those with whom the charterer contracts, and, subject to certain qualifications which do not now fall to be considered, none to third parties. Whether the charter amounts to a demise or not is determined by ascertaining if the shipowner has parted

<sup>1</sup> *Les Affréteurs Réunis v. Leopold Walford, Ltd.*, [1919] A.C. 801; *Palgrave, Brown & Son, Ltd. v. S.S. "Turid,"* [1922] 1 A.C. 397.

<sup>2</sup> *Hogarth & Sons v. Leith Cotton Seed Oil Co.*, 1909 S.C. 955; *The "Strathlorne" S.S. Co. v. Baird & Sons*, 1916 S.C. (H.L.) 134; *Rederi Aktiebolaget Actus v. Hellas & Co., Ltd.*, 1925, 42 T.L.R. 69.

<sup>3</sup> *In re Missouri S.S. Co.*, 1889, 42 Ch. D. 321.

<sup>4</sup> *Lloyd v. Guibert*, 1865, L.R. 1 Q.B. 115; *Jones v. Oceanic Steam Navigation Co.*, [1924] 2 K.B. 730; *The "Express,"* 1872, L.R. 3 A. & E. 597; *The "August,"* [1891] P. 328.

<sup>5</sup> *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.*, 1883, 10 Q.B.D. 521; see also *The "Industrie,"* [1894] P. 58.

<sup>6</sup> *Owners of "Immanuel" v. Denholm & Co.*, 1887, 15 R. 152. (For the principles of construction applicable to the contract of affreightment and the effect of foreign law, see Scrutton on Charter-parties, 12th ed., pp. 17 *et seq.*; Carver, Carriage by Sea, 7th ed., ch. 6 and 7.)

with possession of the ship, and ceased to control those who employ her.<sup>1</sup> The charterer in such a case is deemed owner of the ship within the meaning of ss. 503 and 504 of the Merchant Shipping Act, 1894, and entitled to the limitation of liability conferred by these sections.<sup>2</sup>

#### SUBSECTION (6).—*Ordinary Charters.*

**91.** By the common forms of charter, the shipowner gives to the charterer the full use, or the use of a specified portion, of his ship to carry goods or passengers, which the charterer agrees to ship. Sometimes the charterer takes the ship for a period of time, agreeing to pay freight at so much a week or month. Sometimes the charter is for a voyage or voyages, and the freight is either a lump sum or calculated at so much per ton of cargo. In these cases the shipowner retains possession of the ship, and remains responsible to third parties for any injury his ship may do by the fault of the crew or others for whom he is responsible. The carriage of passengers, which is to some extent regulated by statute, is dealt with in Part III.

**92.** In time-charters there is generally provision made for the hire ceasing in the event of loss of time from deficiency of men or stores, break-down of machinery, or damage, etc., whereby the working of the vessel is stopped for more than a very limited time. The effect of this clause has been considered in cases to which reference may be made.<sup>3</sup> In *Giertsen v. Turnbull* it was held that, though the hire stopped, the charterers could not recover the cost of coals consumed in making for a port to repair. An exception of "strikes" in the charter-party will not excuse payment of freight by the charterer for time during which he is prevented from using the ship by reason of a strike.<sup>4</sup>

**93.** Provision is generally made that over and above the time contemplated by the charter the ship shall continue on hire until the end of any voyage current at the date when, according to time, the charter expires, and it has been held that the charterer can start the ship on a voyage which cannot be finished before the time runs out.<sup>5</sup>

**94.** The owner stipulates that he may withdraw the ship if the charterer does not duly pay the freight, which is generally paid in advance. In such cases the owner must act with reasonable promptitude or he may be held to have waived his privilege.<sup>6</sup> Where the shipowner

<sup>1</sup> *Baumvull Manufacturers v. Furness*, [1893] A.C. 8; cp. *Manchester Trust v. Furness, Withy & Co.*, [1895] 2 Q.B. 282, 539.

<sup>2</sup> *Sir John Jackson, Ltd. v. Owners of S.S. "Blanche"*, [1908] A.C. 126.

<sup>3</sup> *Hogarth v. Miller*, 1889, 16 R. 599; [1891] A.C. 48; *Vogeman v. Zanzibar S.S. Co.*, 1902, 7 Com. Ca. 254 (C.A.); *Aktieselskabet Lina v. Turnbull & Co.*, 1907 S.C. 507; *Meade, King, Robinson & Co. v. Jacobs & Co.*, [1915] 2 K.B. 640; *Smailes & Son v. Evans & Reid*, [1917] 2 K.B. 54; *Giertsen v. Turnbull & Co.*, 1908 S.C. 1101.

<sup>4</sup> *Brown v. Turner, Brightman & Co.*, [1912] A.C. 12.

<sup>5</sup> *Dene S.S. Co. v. Bucknall*, 1900, 5 Com. Ca. 372; but see *Istok v. Drughorn*, 1902, 7 Com. Ca. 190 (C.A.).

<sup>6</sup> See *Tyrer v. Hessler*, 1902, 7 Com. Ca. 166; *MacLaine v. Gatty*, [1921] A.C. 376; *Modern Transport Co. v. Duneric Steamship Co.*, [1917] 1 K.B. 370.



has withdrawn the ship he cannot claim freight for any period after the date of withdrawal,<sup>1</sup> but he may recover damages in respect of loss of future freight.<sup>2</sup> As to the exercise of the owner's stipulated lien over freight, reference may be made, *e.g.* to *Tagart, Beaton & Co. v. J. Fisher & Sons*.<sup>3</sup>

#### SUBSECTION (7).—*Bills of Lading.*

95. The charterer frequently wants to load the ship with the goods of others, for which purpose he takes the shipowner bound to grant by his master bills of lading. Questions may then arise how far these third parties have rights against the shipowner, and how far they are bound by the terms of the contract contained in the charter when these differ from, or are not incorporated in, the bill of lading.<sup>4</sup> Such questions, and the cognate question how far the charter is incorporated in the bill by reference, will be treated under Bill of Lading.<sup>5</sup> So far as the rights of the owners of cargo are not restricted by their contract with the charterers, or as evidenced by the bill of lading, they have a right of action for damage against the shipowner, either under the contract in the bill of lading, or, it is said, in respect of his or his servants' wrongful acts where the goods in their charge have been damaged.<sup>6</sup>

96. In contracts to which the Carriage of Goods by Sea Act, 1924, is applicable, bills of lading issued under a charter must comply with the terms of the rules. Such a bill of lading is within the definition of "a contract of carriage" in Article I. of the rules from the moment it regulates the relations between the carrier and the holder which, in the case of a bill granted to a shipper other than the charterer, would appear to be upon issue.<sup>7</sup>

97. Following on the charter, the charterer receives in ordinary course bills of lading. In some cases the latter contain conditions which differ from those in the charter. The general rule is that the charter regulates the contract, and the bill of lading is treated only as an acknowledgment for the goods put on board, or as evidencing the contract between the charterers and shippers under him. So, where the charter contained a negligence clause, and the bill of lading none, the shipowner was held entitled to found on the clause in a question with the charterer or a person standing in his shoes.<sup>8</sup> Exactly the same principle has been applied where the opposite was the case, so as to make the ship liable for negligence not excluded by the charter, but

<sup>1</sup> *Italian State Railways v. Mavrogordatos*, [1919] 2 K.B. 305.

<sup>2</sup> *The "Startforth"*, [1922] 1 K.B. 508.

<sup>3</sup> [1903] 1 K.B. 391.

<sup>4</sup> *The "Northumbria"*, [1906] P. 292.

<sup>5</sup> See para. 131 *et seq.*, *infra*.

<sup>6</sup> See Scrutton, 12th ed., p. 285.

<sup>7</sup> See Carriage of Goods by Sea Act, 1924, Art. I.

<sup>8</sup> *Delaurier v. Wyllie*, 1889, 17 R. 167.

covered by the bill of lading negligence clause.<sup>1</sup> If, however, it is clear that the parties meant to innovate the charter by the bill of lading, the change will be respected.<sup>2</sup> Since the Carriage of Goods by Sea Act, 1924, does not apply to charter-parties, so long as the charter remains the operative document and the bill of lading is a mere receipt in the hands of the charterer the rules do not affect the contract.

98. Where under the charter the master is bound to sign bills of lading as presented by the charterer it is the duty of the latter to see that the bills of lading are in accord with the charter, and if he omits, *e.g.* to incorporate the negligence clause, so that the shipowner has to make good claims by the holders of the bills of lading, the shipowner has a claim of indemnity against the charterer.<sup>3</sup>

SUBSECTION (8).—*Obligations implied if Charter contains no Provision to Contrary.*

99. The charter in its simplest form may do no more than specify the name of the ship, and set forth the agreed-on voyage and freight therefor, though in fact it always somewhat amplifies the exceptions from liability of the ship. In such a case the greater part of the contract rests on implication, and it is necessary to consider the bargain the law makes for the parties.

100. The shipowner undertakes to proceed without delay to the port of loading, if not already there, and there load the agreed-on cargo.<sup>4</sup> It is his duty to do so with reasonable speed, and, on arrival, to give notice to the charterers of his readiness to load. The cargo, in the absence of express provision, falls to be loaded in accordance with the usual custom of the port; and if there are more berths than one at which it is usual to load the cargo, the charterer has right to indicate the one to which he requires the ship to proceed, provided he selects one reasonably free. The charterer is under obligation to furnish timeously the agreed-on cargo,<sup>5</sup> and if a different cargo is shipped the owner may claim the market rate of freight for such cargo if in excess of the chartered freight.<sup>6</sup> The charterer is not bound to have the cargo forward so soon that the ship may be able to take advantage of unforeseen circumstances, which could not reasonably have been contemplated, whereby she would have been able to load out of turn had the cargo arrived.<sup>7</sup> It has been held that a guarantee by the shipowner of carrying capacity

<sup>1</sup> *Rodocanachi v. Milburn Bros.*, 1886, 18 Q.B.D. 67; *Rowlor S.S. Co. v. Love & Stewart*, 1916 S.C. (H.L.) 199, per Lord Sumner at p. 204.

<sup>2</sup> See *Davidson v. Bisset*, 1878, 5 R. 706.

<sup>3</sup> *Kruger v. Moel Tryvan Ship Co.*, [1907] A.C. 272; see Bills of Lading, para. 131 *et seq.*, *infra*.

<sup>4</sup> *Nelson & Sons v. Dundee East Coast Shipping Co.*, 1907 S.C. 927.

<sup>5</sup> *Ardan S.S. Co. v. Weir & Co.*, 1905, 7 F. (H.L.) 126.

<sup>6</sup> *Steven v. Bromley*, [1919] 2 K.B. 722.

<sup>7</sup> *Little v. Stevenson*, [1896] A.C. 108; but see *Ardan S.S. Co.*, *ut supra*; *Krog & Co. v. Burns & Lindemann*, 1903, 5 F. 1189.

is to be understood as referring to the abstract capacity of the ship<sup>1</sup> unless upon a proper construction of the guarantee it appears to have been given by the owners in knowledge of and with reference to a particular cargo to be shipped on the contemplated voyage.<sup>2</sup>

**101.** The charterer has right to all carrying spaces in the ship, but not, in the absence of custom, to put cargo on deck.<sup>3</sup> It is the duty of the owner, even where he has demised his ship, to supply ballast.<sup>4</sup>

**102.** The owner warrants that the ship is seaworthy when she sails, *i.e.* is reasonably fit—in both equipment and crew—to make the voyage contracted for, and suitable to carry the chartered cargo, and he is liable for all loss due to breach of this warranty.<sup>5</sup> It should be noted that since the Carriage of Goods by Sea Act, 1924, does not apply to charter-parties as such, the absolute warranty of seaworthiness is still implied in all charters in the absence of express agreement.

**103.** It is also an implied obligation that the ship shall proceed on and prosecute her voyage, without delay or deviation, by the usual route. If there is deviation, the ship is liable for all loss which might not have happened had there been no deviation.<sup>6</sup> The master has, however, considerable discretion as to the port to which he will take his ship in case of damage. So it was held that a Bristol ship, damaged on an outward voyage, having put back to Queenstown, had right to return to Bristol for repairs, without committing a breach of the implied obligation not to deviate.<sup>7</sup> But a general liberty to call at ports, even though couched in wide terms, will not justify a ship practically departing from the voyage contemplated by the shipping contract, and calling at a port outside that voyage altogether.<sup>8</sup>

**104.** The owner, if a common carrier, in the absence of express contract, practically insures the goods, as he undertakes to deliver them safe, the act of God and the King's enemies alone excepted. Even if not a common carrier, there is authority for saying that his obligation is the same so far as not limited by contract.<sup>9</sup> It is a question of fact in each case whether the owner is a common carrier or not.<sup>10</sup> Most charters, however, contain exceptions which at least free the owner

<sup>1</sup> *Millar v. "Freden" (Owners)*, [1918] 1 K.B. 611; *In re Thomson & Brocklebank*, [1918] 1 K.B. 655.

<sup>2</sup> *M'Kill v. Wright*, 1888, 14 App. Ca. 106; see also *Societa Anonima Ungherese v. Tyser Line*, 1902, 8 Com. Ca. 25.

<sup>3</sup> *Wills & Co. v. Burrell & Son*, 1894, 21 R. 527; see, as to bunker coal, *Darling v. Raeburn*, [1907] 1 K.B. 846.

<sup>4</sup> *Weir v. Union S.S. Co.*, [1900] A.C. 525.

<sup>5</sup> *Gilroy v. Price*, [1893] A.C. 56; *Giertsen v. Turnbull & Co.*, 1908 S.C. 1101 (time charter); *The "Europa"*, [1903] P. 84; see Seaworthiness, *infra*, s. 7.

<sup>6</sup> See this question discussed in *Donaldson Bros. v. Little & Co.*, 1882, 10 R. 413; also *Thorley v. Orchis S.S. Co.*, [1907] 1 K.B. 660; *cp. The "Europa," supra*.

<sup>7</sup> *Phelps v. Hill*, [1891] 1 Q.B. 605; *Caffin v. Aldridge*, [1895] 2 Q.B. 366.

<sup>8</sup> *Glynn v. Margetson*, [1893] A.C. 351.

<sup>9</sup> *Liver Alkali Co. v. Johnson*, 1874, L.R. 9 Ex. 338; *Nugent v. Smith*, 1876, 1 C.P.D. 19, 423; *Hill v. Scott*, [1895] 2 Q.B. 371, 713.

<sup>10</sup> *Belfast Ropework Co. v. Bushell*, [1918] 1 K.B. 210; see, however, *Scrutton*, 12th ed., 230; *Carver*, s. 4.



from liability if he has used reasonable care. The owner is in no case liable for damage due to inherent vice or weakness in the goods, or to the defective manner in which they have been packed by the merchant before shipment. But where coals took fire spontaneously, and there was no fault on the part of the shipper, the latter was held to have a good claim, as against the shipowner, to an average contribution for damage to coals not themselves on fire by water used to extinguish the fire.<sup>1</sup> The shipowner is protected by statute from liability for fire where the loss occurs without his fault or privity.<sup>2</sup> He is only liable for robbery or embezzlement under certain conditions (s. 502), and he may limit his liability to a certain amount in certain cases (ss. 502-3). At the port of discharge the duties of the owner and charterer are regulated by what is customary, and in the absence of custom by what is reasonable.

**105.** The merchants are under obligation to use all reasonable diligence to receive the cargo under the circumstances which exist at the time, but are not liable for accidents or causes beyond their control; so, where a strike not due to fault on the part of the merchant delayed the discharge, the merchant was held not liable for the delay.<sup>3</sup> The charterer has to be ready without notice to receive the cargo.<sup>4</sup>

**106.** The exact place at which the carrying voyage begins and ends depends on the words used in the charter. If the ship is to go to a particular port, she has arrived when she reaches that port and is ready to load or discharge at a usual berth for loading or discharging. But if the charter indicates a particular part of the port, *e.g.* a named dock, the vessel has to reach that part before she has arrived. So if the charterer stipulates that the ship is to go to a berth as ordered by him, then the ship only arrives at her destination when she reaches such berth, unless, indeed, it is due to the charterer's fault that she is unable to reach the berth sooner. As has been said, the charterer has an implied right to name a berth, but unless he is given this right in express terms, the ship will be held to be arrived when she has reached the larger area—port or dock—to which, under the charter, she is directed to proceed.<sup>5</sup>

**107.** The owner and his master are under obligation to take due care of the goods entrusted to them, and in case of emergency to act with reference to the interests of the venture as a whole. Thus the ship has been held liable in damages for carrying forward goods in a damaged state without taking steps, which in the circumstances might reasonably have been done, to condition them.<sup>6</sup> But the master is not under obligation to sacrifice the interests of the ship and venture

<sup>1</sup> *Greenshields, Cowie & Co. v. Stephens*, [1908] A.C. 431.

<sup>2</sup> Merchant Shipping Act, 1894, s. 502; see *The "Diamond,"* [1906] P. 282; *Lennards Carrying Co. v. Asiatic Petroleum Co., Ltd.*, [1915] A.C. 705.

<sup>3</sup> *Hick v. Raymond & Reid*, [1893] A.C. 22; *Hulthen v. Stewart*, [1903] A.C. 389; *Van Liewen v. Hollis*, [1920] A.C. 239.

<sup>5</sup> *Leonis S.S. Co., Ltd. v. Rank*, [1908] 1 K.B. 499.

<sup>4</sup> Carver, 7th ed., s. 621.

<sup>6</sup> *Notara v. Henderson*, 1872, L.R. 7 Q.B. 225; *Adam v. J. & D. Morris*, 1890, 18 R. 153; *Hansen v. Dunn*, 1906, 11 Com. Ca. 100 (perishable cargo).



generally, to lessen injury to particular goods. The question is, it is thought, one of reasonableness, all things considered. The master, if practicable, ought to consult the cargo-owner before incurring expense.

**108.** The charterer is liable in damages if injury results from his shipping dangerous or unlawful merchandise without the knowledge of the owner. The interpretation of this rule has been extended to the effect that goods may be dangerous within this principle if, owing to legal obstacles as to their carriage or discharge, they involve detention of the ship;<sup>1</sup> but where both the nature of the cargo and the particular difficulty that may arise are known to the owner at the time of arranging the charter, the charterer will not be liable for delay.<sup>2</sup>

#### SUBSECTION (9).—*Special Provisions.*

**109.** The reciprocal legal rights and obligations of the parties to the charter can, any or all of them, be affected by express bargain. In certain cases the effect is to make proof of custom inadmissible, because contradictory of the written contract; *e.g.* when the charter provides that goods are to be brought to and taken from alongside at merchants' risk and expense, a custom that the ship pays for lighterage is not admitted.<sup>3</sup>

##### (i) *Safe Port.*

**110.** Frequently provision is made for the ship proceeding to load or discharge at a safe port, or so near thereto as she can safely get. The port must be one into which the ship may go safely without danger from political as well as from physical causes, and danger likely to be incurred on the voyage to a port may be taken into account in deciding whether such port is a safe one.<sup>4</sup> The port must not only be safe for the ship to lie at, but safe for her to leave as a loaded ship. It has been held that charterers who, having an option to name ports of loading, named a harbour with a bar, which required the ship to take a certain portion of her cargo outside the bar, were in breach of the contract.<sup>5</sup> The words "so near thereto as she can safely get," do not merely refer to physical obstacles to the ship getting to the port, but to any cause which prevents her reaching the port in a reasonable time.<sup>6</sup> The fact that the ship cannot reach the port immediately will not, however, justify her in requiring the charterer to take delivery at the nearest place she can get to.<sup>7</sup> She must wait a reasonable time, *e.g.* for spring

<sup>1</sup> *Mitchell, Cotts & Co. v. Steel*, [1916] 2 K.B. 610.

<sup>2</sup> *Owners of S.S. "Sebastian" v. De Vizcaya*, [1920] 1 K.B. 332; and for limitation of rule, *Transoceanica Societa v. Shipton* [1923], 1 K.B. 31; *Rederi Aktiebolaget Transatlantic v. Board of Trade*, 1924, 30 Com. Ca. 117 at p. 128.

<sup>3</sup> *The "Nifa"*, [1892] P. 411; *Brenda S.S. Co. v. Green*, [1900] 1 Q.B. 518; *Palgrave Brown v. S.S. "Turid"*, [1922] A.C. 397.

<sup>4</sup> *Palace Co. v. Gans S.S. Line*, [1916] 1 K.B. 138; *The Robert Dollar Co. v. Blood, Holman & Co.*, 1920, 4 L.L. Rep. 343, where the authorities are discussed.

<sup>5</sup> *Charpentier & Bedex v. Dunn & Sons*, 1878, 15 S.L.R. 726.

<sup>6</sup> *Dahl v. Nelson*, 1881, 6 App. Ca. 38.

<sup>7</sup> *"Knutsford" S.S. v. Tillmanns*, [1908] A.C. 406.

tides, if by so doing she can reach the named port. The place so near thereto must, it has been said, be within reasonable reach of the named port—within what is known as the ambit of the port.<sup>1</sup>

111. There have been conflicting decisions on the question whether a ship, able to reach her port by discharge of part of her cargo, is or is not bound so to discharge part, at all events if the merchant offers to pay the expense, and then to proceed to her named port. The case of *The "Alhambra,"*<sup>2</sup> which decides that the ship is not so bound, has been followed in several cases,<sup>3</sup> and this decision may be considered as established in England. The decision to the contrary effect in the earlier Scottish case of *Hillstrom v. Gibson*,<sup>4</sup> would now probably not be followed.

(ii) *Demurrage.*

112. Provision is made in most charters for the time to be occupied in loading and discharge; how the time is to be calculated; and the agreed-on sum to be paid if the ship is detained. This subject will be considered later.<sup>5</sup>

(iii) *Cancelling Clause.*

113. By a clause known as the cancelling clause, it is often agreed that if the ship does not reach her loading port, or is not ready to load by a named date, the charterers have right to cancel the charter. The charterer is only bound to exercise his option when the ship arrives at the port, or is ready to load,<sup>6</sup> and in the latter case the ship is not ready unless her whole holds are at the charterer's disposal, when he has chartered the whole ship.<sup>7</sup>

(iv) *Cesser Clause.*

114. Another important clause on which there has been much litigation is that known as the cesser clause, whereby it is commonly provided that the charterer's whole responsibility is to cease on shipment of the cargo, the shipowner having a lien for freight, dead freight, and demurrage. With regard to claims which have accrued prior to the completion of the shipment, the effect of this clause is that the charterer is only relieved of liability in so far as another remedy for such claims has been given to the shipowner by way of lien or other security over the cargo. Accordingly, where a ship was detained at her port of loading, not only for the agreed-on number of days in respect of

<sup>1</sup> *Schilizzi v. Derry*, 1855, 4 E. & B. 873.

<sup>2</sup> 1881, 6 P.D. 68.

<sup>3</sup> *Reynolds v. Tomlinson*, [1896] 1 Q.B. 586; *Erasmus Treglia v. Smith's Timber Co.*, 1896, 1 Com. Ca. 360; *Hall Brothers S.S. Co. v. Paul*, 1914, 19 Com. Ca. 384.

<sup>4</sup> 1874, 8 M. 463.

<sup>5</sup> See para. 176 *et seq.*, *infra*.

<sup>6</sup> *Mocl Tryvan Ship Co. v. Weir*, [1910] 2 K.B. 844.

<sup>7</sup> *Vaughan v. Campbell*, 1885, 2 T.L.R. 33; *Grampian S.S. Co. v. Carver*, 1893, 9 T.L.R. 210; *The "Austin Friars"*, 1894, 10 T.L.R. 633; *Armement Adolf Deppe v. Robinson & Co.*, [1917] 2 K.B. 204.

which demurrage was payable, but for a further period, in respect of which there was a claim of damages for breach of the charter by detention of the ship, the charterer was relieved of the demurrage, as the owner had by the contract a lien, but had to meet the claim of damages in respect that no lien was given therefor.<sup>1</sup>

115. With regard to claims arising during the voyage and at the port of discharge, it was formerly thought that the cesser clause put an end to the charterer's liability whether a lien was given or not, but from recent cases it appears that the clause may be given the same construction in relation to these claims as in relation to claims arising prior to shipment, and that the charterer will not be excused unless the owner receives another remedy.<sup>2</sup>

It must, however, be observed that if the terms of the charter are absolutely clear, they will be enforced, however apparently unjust.<sup>3</sup>

(v) *Negligence Clause and other Clauses of Exception.*

116. The charter, as now framed, generally contains a clause which frequently runs as follows: "The act of God, the King's enemies, fire, perils of the sea, and all and every dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever excepted." If this clause occurs in a bill of lading, it is usually for the benefit of the shipowner; but as the charter is a mutual contract, it is a question in each case whether the exceptions in it are mutual or not.<sup>4</sup> The usual practice is to insert the word "mutually" when it is meant that the charterer shall take benefit of the exceptions;<sup>5</sup> and unless this is done, or the clause as framed indicates it as meant to be a mutual clause, the exceptions should, it is thought, be treated as for the ship's benefit. After long controversy, it is now settled that "perils of the sea" and such other phrases, when used in relation to the contract of affreightment, have the same meaning as when used in policies of insurance—that is, in all cases they have their ordinary meaning.<sup>6</sup> The first of the cases cited, overruling an earlier case, settled that damage by collision at sea due to no fault on the part of the carrying ship, but to fault of the other ship, is a peril of the sea within the exception in the contract.

117. The meaning of these special exceptions will be examined elsewhere. (See INSURANCE (MARINE).) But it must be kept in view

<sup>1</sup> *Gardiner v. Macfarlane, M'Crindell & Co.*, 1889, 16 R. 658; *Clink v. Radford*, [1891] 1 Q.B. 625; *Dunlop & Sons v. Balfour*, [1892] 1 Q.B. 507.

<sup>2</sup> *Hansen v. Harrold*, [1894] 1 Q.B. 612; *Jenneson, Taylor & Co. v. Secretary of State for India*, [1916] 2 K.B. 702; *Scrutton*, 12th ed., 174; *Carver*, ss. 649, 650.

<sup>3</sup> *Milrain v. Perez*, [1861] 3 E. & E. 495.

<sup>4</sup> *Cp. Scrutton*, 12th ed., 239; and *Carver*, 7th ed., 77; *Cazalet v. Morris & Co.*, 1916 S.C. 952; *Aktieselskabet General Gordon v. Cape Copper Co.*, 1921, 26 Com. Ca. 289; *Cantiere Navale Triestina v. Handelsvertretung der Russe*, [1925] 2 K.B. 172.

<sup>5</sup> *Bruce v. Nicolopulo*, 1855, 24 L.J. Ex. 321.

<sup>6</sup> *The "Xantho"*, 1887, 12 App. Ca. 503; *Hamilton v. Pandorf*, 1887, 12 App. Ca. 518.



that the liability of the insurer and of the shipowner respectively depends on different considerations. Under a policy of insurance by which a ship is insured from loss by perils of the seas, the underwriters are liable to pay for a loss due to these perils, though brought about by the negligence of the assured's servants, for under the insurance contract the law regards only the *proxima causa*.<sup>1</sup> In the same case, the shipowner may have excepted perils of the seas from his agreement to fulfil the contract of affreightment, but he is nevertheless liable in damages to the charterer, because, while the loss is one due to the perils excepted, he cannot found on the exception in the case of a person with whom he has contracted to carry goods, when the real explanation is that the casualty has been brought about, or materially contributed to, by the negligence of those for whom he is liable; so soon as this is ascertained, he is responsible. In such cases the onus of proof shifts from time to time. The onus of proving that loss is due to an excepted peril lies upon the shipowner;<sup>2</sup> but once he has shewn that the loss was due *prima facie* to such a cause it is for the merchants to prove that there was negligence.<sup>3</sup> But the facts themselves may easily raise a presumption of fault, which the shipowner must redargue.<sup>4</sup>

118. The cardinal rules in construing exceptions in favour of shipowner or merchant, which purport to relieve them from the ordinary legal liability implied by the contract, are: (a) that it is for the party pleading the exception to bring himself within it, and prove that it applies; (b) that the clause is construed so as to restrict liability only so far as is necessary to give it a reasonable meaning; and (c) that while effect will be given to exceptions clearly made, no ambiguous provision will suffice.<sup>5</sup> Sometimes in charters, and very commonly in bills of lading, there are long lists of exceptions which provide for almost every conceivable case, and it is impossible to do more than refer to some illustrative examples. As the exception of perils of the seas does not exclude liability for a loss from these perils due to negligence, so an exception of "leakage" or "breakage" is satisfied by holding that it relieves the owner from, in the first instance, accounting for the damaged state of the goods, and does not relieve him, if the merchant affirmatively proves that the injury is due to the negligence of those in charge of the ship.<sup>6</sup> An exception of liability for obliteration of markings does not excuse the owner from delivering the identical goods shipped, and so where during the voyage various separate consignments have become

<sup>1</sup> For the meaning of *proxima causa*, see *Samuel v. Dumas*, [1924] A.C. 431.

<sup>2</sup> *Baxter's Leather Co. v. Royal Mail S.P. Co.*, [1908] 1 K.B. 796, 2 K.B. 626; *Travers & Sons v. Cooper*, [1915] 1 K.B. 73.

<sup>3</sup> *The "Glendarrock"*, [1894] P. 226.

<sup>4</sup> *Williams v. Dobbie*, 1884, 11 R. 982; *Cunningham v. Colvils, Lowden & Co.*, 1889, 16 R. 295.

<sup>5</sup> See, e.g. *Elderslie S.S. Co. v. Borthwick*, [1905] A.C. 93; *Nelson Line v. Nelson* (No 2), [1908] A.C. 16.

<sup>6</sup> *Moes, Moliere & Tromp v. Leith and Amsterdam Shipping Co.*, 1867, 5 M. 988; *Horsley v. Baxter Bros. & Co.*, 1892, 20 R. 333.



immixed and indistinguishable the consignee is not bound to accept a proportionate share of the mass on the principle of *commixtio*.<sup>1</sup>

119. Accordingly, owners very generally further protect themselves by a negligence clause, which varies in different cases.<sup>2</sup> It sometimes exempts the owner from responsibility for an unseaworthy ship, and not uncommonly such a negligence claim is subject to the qualification, "provided all reasonable means have been taken to make the ship seaworthy." In this latter form it is, perhaps, not unreasonable, as it has been held that a latent defect in the ship exposes the owner to claims in respect of his implied undertaking that the ship is seaworthy when she starts on her voyage.<sup>3</sup> Under a contract freeing the shipowner from liability for unseaworthiness not due to want of reasonable diligence on the part of the owners, it has been held that the owner is not protected if there has been negligence on the part of his servants, *e.g.* the ship's carpenter.<sup>4</sup> But the negligence clause does not relieve the shipowner of the condition to have the ship seaworthy unless clear words are used.<sup>5</sup>

120. An ordinary form of negligence clause is one which provides that the negligence of the masters, mariners, and crew in the navigation of the ship is always excepted; but, as has been indicated, the clause often goes far beyond this, and, if unequivocal, it will be given effect to. Bad stowage by stevedores is not covered by the clause without words to that effect.<sup>6</sup> Indeed, it has been held that bad stowage is not part of the "navigation and management of the ship" within the meaning of these words as used in an exemptive clause in bills of lading or charter,<sup>7</sup> nor is error in choice of route,<sup>8</sup> or failure to order steam to be kept up in harbour.<sup>9</sup> But if the words of exception cover servants or agents of the owners in the navigation of the ship, or otherwise, this will exclude liability for bad stowage.<sup>10</sup> If, however, the negligent stowage results in unseaworthiness the exception of negligence is ineffective.<sup>11</sup> A question has been raised whether the exceptions apply from the time the goods reach the shipowner's hands, or only after the voyage begins. If applicable to the earlier period, they will be so applied.<sup>12</sup>

<sup>1</sup> *Tyzack & Branfoot S.S. Co. v. Sandeman & Sons*, 1913 S.C. (H.L.) 84.

<sup>2</sup> See, *e.g.* *The "Accomac"*, 1890, 15 P.D. 208; *The "Cressington"*, [1891] P. 152; *The "Southgate"*, [1893] P. 329; *Gilroy v. Price*, [1893] A.C. 56.

<sup>3</sup> *The "Glenfruin"*, 1885, 10 P.D. 103.

<sup>4</sup> *Dobell v. S.S. "Rossmore" Co.*, [1895] 2 Q.B.D. 403; *The Standard Oil Co. v. Clan Line*, 1924 S.C. (H.L.) 1.

<sup>5</sup> *Steel & Craig v. State Line S.S. Co.*, 1877, 4 R. (H.L.) 103; and *Gilroy v. Price*, *ut supra*; *Owners of Cargo of "Maori King" v. Hughes*, [1895] 2 Q.B.D. 550 (breakdown of refrigerating machinery).

<sup>6</sup> *Hayn v. Culliford*, 1879, 4 C.P.D. 182.

<sup>7</sup> *The "Ferro"*, [1893] P. 38.

<sup>8</sup> *Owners of S.S. "Lord" v. Newsum Sons & Co.*, [1920] 1 K.B. 846.

<sup>9</sup> *Toyosaki Kissen Kaisha v. Affréteurs Réunis*, 1922, 27 Com. Ca. 157.

<sup>10</sup> *Baerselman v. Bailey*, [1895], 2 Q.B.D. 301.

<sup>11</sup> *Elder Dempster v. Paterson, Zochonis & Co.*, [1924] A.C. 522.

<sup>12</sup> *The "Carron Park"*, 1890, 15 P.D. 203; *Norman v. Binnington*, 1890, 25 Q.B.D. 475; see also Scrutton, 12th ed., p. 276, where the cases are discussed.

121. If the parties agree that goods are to be carried at owner's risk (that is, the goods owner's risk), this is held to mean that there is to be no claim in respect of negligence on the voyage. But if the goods are jettisoned, the owner has a claim to average contribution from the ship, notwithstanding the clause.<sup>1</sup>

122. Charterers and shippers have frequently insisted on exceptions in their favour, with the object of relieving them from claims in respect of failure timeously to furnish or take delivery of the cargo. The same rules of construction are applied to these exceptions as to exceptions in favour of the ship. Thus a clause providing that "detention by frost, floods, riots, and strikes of workmen . . . not to be reckoned lay days," was held not to exempt the charterer from the consequences of delay in bringing the cargo into the particular dock where the ship was loading, as the clause could be read as applicable only to actual delay in loading, and the charterer's duty was to have the cargo forward.<sup>2</sup> On the other hand, if the provision is clear, and the charterer brings himself within it, he will have effect given to it.<sup>3</sup> Sometimes the clause winds up with a general clause exempting the party in whose favour it is conceived from all other causes, or it may be from all causes whatsoever beyond his control. In the former case the general clause is restricted to causes *ejusdem generis* with those that have gone before, but this is not so in the latter.<sup>4</sup>

#### SUBSECTION (10).—*Dissolution of Charter.*

123. In the case of a contract subject to so many risks as the contract of affreightment, occasion arises to consider how and in what cases it falls to be held dissolved without exposing either party to a claim for breach of contract. If, *e.g.*, the ship, owing to excepted perils, does not reach her port of loading until the whole object of the venture has been lost,<sup>5</sup> or if, after the date of the contract, the port of loading is blockaded with no prospect of cessation,<sup>6</sup> in such cases either party can put an end to the charter without claim. Once the cargo has been loaded, the Courts will be more slow to hold the contract dissolved, than where performance has not begun;<sup>7</sup> but in neither case will what is held to be a mere temporary hindrance or obstacle justify a party in throwing up the charter, or not executing it according to its terms.<sup>8</sup>

<sup>1</sup> *Burton v. English*, 1883, 12 Q.B.D. 218; see Scrutton, 12th ed., p. 279; Carver, s. 103.

<sup>2</sup> *Kay v. Field*, 1882, 10 Q.B.D. 241. See also *Grant v. Coverdale*, 1884, 9 App. Ca. 470; *The Granite City S.S. Co. v. Ireland*, 1891, 19 R. 124; *Gardiner v. Macfarlane, McCrindell & Co.*, 1889, 16 R. 658; *Ardan S.S. Co. v. Mathwin & Son*, 1912 S.C. 211; *Dampskibsselskabet Danmark v. Poulsen & Co.*, 1913 S.C. 1043.

<sup>3</sup> *Letricheux & David v. Dunlop & Co.*, 1891, 19 R. 209; *Lilly & Co. v. Stevenson & Co.*, 1895, 22 R. 278; *Smith & Service v. Rosario Nitrate Co.*, [1894] 1 Q.B. 174; *Crawford & Rowat v. Wilson*, 1896, 1 Com. Ca. 277; *Bunge y Born Co. v. Brightman & Co.*, [1925] A.C. 799; *S.S. "Matheos"*, [1925] A.C. 654.

<sup>4</sup> *Larsen v. Sylvestre*, [1908] A.C. 295.

<sup>5</sup> *Jackson v. Union Marine Insur. Co.*, 1874, L.R. 10 C.P. 125.

<sup>6</sup> *Geipel v. Smith*, 1872, L.R. 7 Q.B. 404.

<sup>7</sup> See *Geipel v. Smith*, *cit.*

<sup>8</sup> *Gifford & Co. v. Dishington & Co.*, 1871, 9 M. 1045.

The question whether or not the cause is of so permanent a character as to justify dissolution or refusal to carry out the exact terms of the contract, is one to be determined having regard to the whole circumstances.<sup>1</sup>

124. A shipowner is liable in damages if he abandons the chartered voyage because his ship has been damaged, unless either the ship is so damaged she cannot go on even after reasonable repairs, or the circumstances are such as to make it quite unreasonable, from a business point of view, to complete the charter.<sup>2</sup>

125. If unforeseen circumstances arise which make the exact performance of the contract impossible, the Court will in special cases imply an obligation to do what is reasonable. Where a ship was chartered with right to the charterer to order her either to Dunkirk or Dover, the charterer, a German, ordered her to Dunkirk. Thereafter the war between France and Germany broke out, and it was held that the ship was entitled to deliver the goods at Dover.<sup>3</sup> But where a charterer had right to name any one of several places of discharge on the Thames, he was held entitled to name a place at which a strike was going on, and to take the benefit of an exemptive strike clause, though there was no strike at the other places.<sup>4</sup>

126. Questions also, of course, frequently arise whether a breach of charter entitles the other party to repudiate the contract, or only to claim damages. The general principles which regulate such questions are those applicable to mutual contracts. English cases must be applied with caution; and it must be remembered that in Scotland the ordinary rule is that breach of a material part of a mutual contract by one party entitles the other to refuse to perform his share. At the same time, once the charter has been in part implemented by shipping the cargo, it is difficult, and in most cases unjust, to rescind or put an end altogether to the contract; and then, in accordance with general principles, and subject to special cases, some of which have been already noted, the charter cannot be repudiated, but damages are given for the breach.

#### SUBSECTION (11).—*Damages.*

127. The measure of damages in shipping contracts, and questions as to whether claims are too remote to be allowed, are also to be ascertained by reference to general principles.<sup>5</sup> It has been laid down that the measure of damages in such cases is the same in Scotland as in England.<sup>6</sup> The ordinary measure of damage in the case of refusal by the ship or merchant to load is the difference between chartered and

<sup>1</sup> On the subject of frustration of the contract generally, see Scrutton, 12th ed., 107 *et seq.*; Carver, ss. 231 *et seq.*, and cases there cited.

<sup>2</sup> *Assicurazioni Generali Co. v. Bessie Morris S.S. Co.*, [1892] 2 Q.B. 652.

<sup>3</sup> *The "Teutonia"*, 1872, L.R. 4 P.C. 171.

<sup>4</sup> *Bulman v. Fenwick*, [1894] 1 Q.B. 179.

<sup>5</sup> *Montevideo Gas Co. v. Clan Line*, 1921, 37 T.L.R. 866.

<sup>6</sup> *Stroms Bruks Aktie Bolag v. Hutchison*, [1905] A.C. 515.



current freight, plus any reasonable expense incurred. But this is subject to large variation, according to special circumstances.

128. It has been held that loss of special profit on a cargo cannot be claimed unless at the time of the charter the sale-contract was so communicated as to be in view of both parties.<sup>1</sup> In the case of *Stroms Bruks Aktie Bolag v. Hutchison*<sup>2</sup> shipowners who failed to carry goods from Sweden to Cardiff under a charter were held bound to pay by way of damages the increased cost to the charterers of replacing the goods at Cardiff. In this case the effect of the usual penalty clause in charters was considered, and the shipowners were held not entitled to found on it.<sup>3</sup> Reference may also be made to the case of *Salvesen v. Rederi Aktiebolaget Nordstjernen*<sup>4</sup> as illustrating the rules as to measure of damages.

129. Shipowner and freighter alike must take reasonable steps to diminish the loss due to a breach of contract by the other.<sup>5</sup> In the case of the shipowner failing to convey goods timeously, the merchant may, so long as he acts reasonably, send them on at increased expense by another and quicker route so as to reach in time, and charge the ship therefor.<sup>6</sup> Where a ship was described in the charter "as now sailed or about to sail," failure to satisfy this condition was held sufficient to have entitled the charterer to repudiate the contract, though in the particular case it was held that he had waived his right and could only claim damages.<sup>7</sup> As we have seen, a charterer who agrees to load a full cargo on board a ship has not the right to ship cargo on deck in the absence of custom or bargain, and if the shipowner carries another shipper's goods on deck, while the charterer may claim damages for any loss caused to him thereby he cannot make a claim for the additional freight thus earned.<sup>8</sup> A charter contained an exception of fire which applied to the charterer. A large portion of the intended cargo was burned. The charterer was held bound to supply the balance of the cargo, and the shipowner entitled to fill up the ship with cargo, so long as he did not unreasonably delay her sailing, and to keep the freight for himself.<sup>9</sup> These examples may to some extent indicate the lines on which general principles have been applied to the contract under consideration.

#### SECTION 4.—BILL OF LADING.

130. The bill of lading may be considered in three aspects: (1) as a contract of carriage, or perhaps more strictly as evidence of such a contract; (2) as a document of title; and (3) as a security-writ.

<sup>1</sup> *The "Parana,"* 1877, 2 P.D. 118.

<sup>2</sup> Cf. *Watts v. Mitsui*, [1917] A.C. 227.

<sup>3</sup> *Weir v. Dobell*, [1916] 1 K.B. 722.

<sup>4</sup> *Connal, Cotton & Co. v. Fisher, Renwick & Co.*, 1882, 10 R. 824.

<sup>5</sup> *Bentsen v. Taylor* (No. 2), [1893] 2 Q.B. 274.

<sup>6</sup> *Wills & Co. v. Burrell & Son*, 1894, 21 R. 527.

<sup>7</sup> *Aitken, Lilburn & Co. v. Ernsthausen*, [1894] 1 Q.B. 773.

<sup>8</sup> [1905] A.C. 515.

<sup>9</sup> 1905, 7 F. (H.L.) 101.



SUBSECTION (1).—*As a Contract of Carriage.*(i) *Form and General Effect.*

**131.** In its original form the bill of lading was merely, as between the parties to it, evidence of a contract of carriage—which contract had been embodied in a charter-party prior to the delivery of the goods or the signing of the bill of lading. A vessel having been chartered to convey a cargo from one port to another, on terms fully expressed in the charter-party, the merchant loaded his goods on board, and, at the conclusion of the loading, received from the master a bill of lading acknowledging receipt of the goods, and obliging him to deliver the same at the port mentioned in the charter-party. Its ordinary form (still largely employed) was as follows: “Shipped in good order and well conditioned by *A. B. & Company*, in and upon the good ship called the *C.*, whereof *F. G.* is master for the present voyage, and now in the port of *X.*, and bound for *Y.*, 500 tons iron, being marked and numbered on the margin, and are to be delivered in the like good order and well conditioned at the foresaid port of *Y.* (the act of God, the King’s enemies, fire, and all and every other danger and accident of the sea, rivers, and of whatever nature and kind soever, excepted), or to the orders or assignees, he or they paying freight for the said goods, and all other conditions as per charter-party, with primage and average accustomed.—In witness whereof, the master or purser of the said ship hath conformed to three bills of lading all of this tenor and date—one of which being accomplished, the others to stand void.”

**132.** Where the charterer is at the same time shipper of the goods, the simple document does not in any way alter the conditions of carriage as expressed in the charter-party. In so far as it contains an acknowledgment under the master’s hand of the quantity and quality of cargo put on board, it is *prima facie* evidence that goods of the specified quantity and quality have actually been received, but the evidence may be rebutted by proof to the contrary. As between the charterer and shipowner, accordingly, a bill of lading affords *prima facie* evidence that the former’s obligation to load cargo has been fulfilled.<sup>1</sup>

**133.** The form of the document, however, shews that it was not intended to serve so limited a purpose. The obligation to deliver being general, shippers soon commenced to transfer the property in the goods by endorsing the bill of lading in favour of an assignee to whom they had sold the cargo therein described. The introduction in this manner of a third party entirely ignorant of the nature, quantity, and condition of the cargo which he was buying, except in so far as the bill of lading conveyed the information, very soon tended to modify its original character. When the bill of lading contained no reference to the charter-party at all, its provisions, as in a question with the onerous endorsee, became the ruling ones, overriding the original contract :

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<sup>1</sup> See Charter-party, *supra*, para. 97.

and the extensive use which was made of this class of document for transferring cargoes of merchandise afloat soon elevated the bill of lading into an instrument of the first importance.

(ii) *Effect in a Question with Onerous Indorsee.*

134. Questions early arose between the indorsee and the shipowner, in consequence of the cargo when delivered not corresponding in quantity or description with the cargo specified in the bill of lading. The onerous indorsee, who had bought on the faith of the bill of lading, sought to make the shipowner responsible, on the ground that he had been induced to part with his money on a false statement subscribed by his servant the shipmaster. This matter has been the subject of frequent litigation; but it may now be held as settled, that if a captain signs for goods which were not actually shipped, the shipowner is not responsible for failure to deliver same. The ground of the decision was that the master was only authorised to sign for goods which he received.<sup>1</sup> The bill of lading, however, affords *prima facie* evidence that the goods therein described were actually shipped, and the shipowner must prove the contrary by the clearest evidence if he is to escape liability.<sup>2</sup> In contracts to which the Carriage of Goods by Sea Act, 1924, applies it is made obligatory for the master to insert certain particulars as to quantity, quality, and description in the bill of lading, which becomes *prima facie* evidence of the receipt by the carrier of the goods as therein described.<sup>3</sup>

135. By express stipulation the owner may bind himself to accept the statement of quantity shipped contained in the bill of lading as conclusive evidence of the cargo received, and such stipulation will be given effect to.<sup>4</sup> A bill is valid in the hands of an onerous indorsee even although signed in blank by the master and the amount shipped afterwards filled in by the shipper.<sup>5</sup> If the shipowner fails to shew that the missing goods were not shipped, he is liable in damages for non-delivery, unless he can attribute the loss to any of the perils excepted. The contract formed by express terms of a bill of lading cannot be contradicted by parole evidence<sup>6</sup> even where a consignee takes delivery of goods before receiving the bill of lading,<sup>7</sup> but a non-contradictory condition may be annexed by proof of custom.<sup>8</sup> If the shipowner incurs greater liability under the bills of lading than he contracted for under the charter-party, he is entitled to be indemnified by the charterer.<sup>9</sup>

<sup>1</sup> *M'Lean & Hope v. Fleming*, 1871, 9 M. (H.L.) 38.

<sup>2</sup> *Smith & Co. v. The Bedouin Steam Navigation Co.*, 1895, 23 R. (H.L.) 1; *Sanday v. Strath S.S. Co.*, 1921, 37 T.L.R. 665.

<sup>3</sup> See Art. III. ss. 3 and 4.

<sup>4</sup> *Lishman v. Christie*, 1887, 19 Q.B.D. 333; *Crossfield v. Kyle Shipping Co.*, [1916] 2 K.B. 885.

<sup>5</sup> *Cowdenbeath Coal Co. v. The Clydesdale Bank*, 1895, 22 R. 682.

<sup>6</sup> *Knight S.S. Co., Ltd. v. Fleming, Douglas & Co.*, 1898, 25 R. 1070.

<sup>7</sup> *Mossiel S.S. Co., Ltd. v. Della Casa Granite Quarries of Italy*, 1899, 1 F. 385.

<sup>8</sup> *Cardiff S.S. Co. v. Jameson*, 1903, 9 Asp. M.C. 367; 88 L.T. 87.

<sup>9</sup> *Kruger v. Moel Tryvan Ship Co.*, [1907] A.C. 272.

(iii) *Consignee's Remedy where Goods not Shipped as stated.*

**136.** If the goods are proved not to have been shipped, the consignee is not without recourse. He may either sue the shipper, or he may take action against the shipmaster in terms of the Bills of Lading Act, 1855,<sup>1</sup> which provides that every bill of lading, in the hands of a consignee or indorsee for value, is to be conclusive evidence against the master or other person signing the same, unless the holder of the bill of lading had actual notice, at the time of receiving it, that the goods were not in fact loaded on board. There is a further proviso that the master may exonerate himself by shewing that the misrepresentation was caused without default on his part, and wholly by the default of the shipper or holder, or some person under whom the holder claims. This provision has not been taken much advantage of in practice, partly perhaps because of the proviso, but mainly because of the difficulty of enforcing liability for any large sum against persons in the position of a shipmaster.

(iv) *Effect of Statements as to Condition of Goods.*

**137.** The bill of lading affords *prima facie* evidence that the goods were shipped in the condition there described, but this may be rebutted by contrary evidence.<sup>2</sup> A strong illustration of the application of the rule is afforded by the case of *Craig & Rose v. Delargy*,<sup>3</sup> where oil was shipped in leaky casks for which a clean bill of lading was granted, with the result that a great part of the cargo had been lost before the vessel arrived. The shipowner was held not responsible for this leakage, he having proved that the casks were in bad condition when shipped. There are, however, English decisions to the effect that a statement in the bill that the cargo was shipped in good order and condition will estop the owner from denying this in a question with an indorsee of the bill who has become an indorsee for value on the faith of the statement.<sup>4</sup> The statement as to condition must be understood, however, only of the external condition of the goods, the onus of proof being shifted where the goods are delivered suffering from latent damage but sound externally. The consignee must then prove affirmatively that such damage was due to the fault of the shipowner or his servants, and not to inherent vice. In the case of misrepresentation as to condition, the consignee has no statutory remedy against the shipmaster.

(v) *"Weight, Value, and Contents unknown."*

**138.** The shipmaster frequently endeavours to qualify his obligation by adding to the bill of lading before signature a clause in the following

<sup>1</sup> 18 & 19 Vict. c. 111, s. 3.

<sup>2</sup> *The "Peter der Grosse,"* 1876, L.R. 1 P.D. 414.

<sup>3</sup> 1879, 6 R. 1269.

<sup>4</sup> *Compania Naviera Vescongada v. Churchill & Sim.* [1906] 1 K.B. 237; *Brandt v. Liverpool Steam Navigation Co.*, [1924] 1 K.B. 575; *The "Tromp,"* [1921] P. 337; Carver, 7th ed., s. 73, and see para. 148, *infra*.



or similar terms: "Weight, value, and contents unknown," or "Quality and quantity unknown." The effect of this clause is that the master is not liable for the description of the weight, quality, or contents of the goods contained in the bill of lading; but he is bound to carry and deliver safely the goods he has received, whatever their contents or weight may be.<sup>1</sup> In such cases the bill does not afford even *prima facie* evidence against the owner of the quantity shipped, and the onus lies on the consignee to prove what in fact was shipped.<sup>2</sup> In contracts to which the Carriage of Goods by Sea Act, 1924, applies, the carrier cannot qualify his obligation so widely.<sup>3</sup>

(vi) *Exceptions in Bill of Lading.*

**139.** The cases which have arisen as to the effect of the various exceptions enumerated in bills of lading are very numerous. In each case the scope of the exception depends on the construction put upon the contract by the Court. Some general rules, however, may be deduced from the decisions in this branch of maritime law: (1) As the exceptions are introduced for the purpose of limiting the liability of the carrier at common law, they will, *in dubio*, be construed against the shipowner.<sup>4</sup> On the other hand, the construction will not be unduly strict, but such as to give effect to the true intention of the parties. (2) Where, as frequently happens, the bill of lading consists of a printed form on which manuscript additions or alterations have been made which are inconsistent with the printed matter, the writing will usually prevail, as being more likely to be expressive of the intention of the parties.<sup>5</sup> (3) Unless otherwise expressly provided, the exceptions will not be held as excusing the shipowner from the initial obligation of providing a seaworthy ship.<sup>6</sup> Even a latent defect, the existence of which renders the vessel unseaworthy after the voyage is commenced, is sufficient to infer responsibility.<sup>7</sup> It is, however, now usual to guard against this contingency by an express clause exempting the shipowner from responsibility for latent defects. Even a stipulation that the shipowner is not to be responsible although the ship is unseaworthy when she sailed, is lawful and will receive effect.<sup>8</sup> (4) If, on the vessel's arrival, the cargo is found to be damaged by one of the excepted causes, the ship is *prima facie* freed from liability; and (where it has not been stipulated that the exemption shall apply even where the damage

<sup>1</sup> *Lebeau v. General Steam Navigation Co.*, 1872, L.R. 8 C.P. 88.

<sup>2</sup> *Craig Line S.S. Co. v. North British Storage, etc., Co.*, 1921 S.C. 114; *New Chinese Antimony Co. v. Ocean S.S. Co.*, [1917] 2 K.B. 644.

<sup>3</sup> Art. III., ss. 3 and 4; see, however, s. 5 of the Act as to bulk cargoes.

<sup>4</sup> *Burton v. English*, 1883, 12 Q.B.D. 222.

<sup>5</sup> *Scrutton v. Childs*, 1877, 3 Asp. M.C. 373; 36 L.T. 212; *The Rowtor S.S. Co. v. Love & Stewart*, 1916 S.C. 223.

<sup>6</sup> *Gilroy Sons & Co. v. Price & Co.*, 1892, 20 R. (H.L.) 1.

<sup>7</sup> *The "Glenfruin"*, 1885, 10 P.D. 103.

<sup>8</sup> *Steel & Craig v. State Line S.S. Co.*, 1877, 4 R. (H.L.) 103.



is attributable to the fault of the crew or other servants of the shipowner) the cargo owner must, in such a case, prove that the damage arose through fault on the part of the persons for whom the shipowner is responsible. Thus, where jute was carried under a bill of lading which, *inter alia*, declared that "the ship is not liable for sweat," and part of the cargo arrived in a damaged condition from "sweat," the burden of proving that the sweating had been occasioned by bad stowage or insufficient dunnage, etc., was thrown upon the cargo owner.<sup>1</sup> The principles applicable to exception clauses in bills of lading are *mutatis mutandis* applicable to exception clauses in charter-parties to which reference may be made *supra*.<sup>2</sup>

(vii) *Effect of Incorporating the Charter-Party by Reference.*

140. The typical bill of lading before quoted contains a clause in these terms: "He or they paying freight for the said goods, and all other conditions as per charter-party." To ascertain the effect of this clause the context in each case must be looked at, but speaking generally the result is that there are incorporated those conditions of the charter-party which are to be performed by the consignee or which refer to the mode of delivery to him by the shipowner, provided that such conditions are applicable to and consistent with the bill of lading and not such as would alter its express stipulations.<sup>3</sup> The clause is still of very usual occurrence, and is of great advantage to the shipowner, as it enables him to settle all disputes which may arise in connection with the voyage at the time of its termination—the effect of the clause being that the onerous indorsee of the bill of lading becomes liable, in addition to his own contract obligations, for the obligations of the shipper under the charter-party, so far as these were still unperformed. Thus, if the charter-party provides that the shipowner is to have an absolute lien on the cargo for all freight, dead freight, and demurrage, as is almost invariably the case, the effect of the clause incorporating the charter-party is to make the indorsee (or consignee as the case may be) indirectly responsible for claims of demurrage arising at the port of loading, or of dead freight, even although he had no notice of the existence of such claims.<sup>4</sup> This question was at one time much canvassed, but it may now be regarded as settled. The clause, however, as a general rule, does not incorporate from the charter-party a cesser clause,<sup>5</sup> or an arbitration clause,<sup>6</sup> or a clause that

<sup>1</sup> *Horsley v. Baxter Bros. & Co.*, 1893, 20 R. 333.

<sup>2</sup> Para. 116 *et seq.*

<sup>3</sup> *Serraino v. Campbell*, [1891] 1 Q.B. at 290; *East Yorkshire S.S. Co. v. Hancock*, 1900, 5 Com. Ca. 266; *Red "R" S.S. Co. v. Allatini*, 1910, 14 Com. Ca. 82; *The "Draupner"*, [1910] A.C. 450; *Manchester Trust v. Furness*, [1895] 2 Q.B. 539 at p. 545; Carver, s. 160; Scrutton, 12th ed., pp. 65 *et seq.*

<sup>4</sup> *Gray v. Carr*, 1871, L.R. 6 Q.B. 522; *Lamb v. Kaselack, Alsen & Co.*, 1882, 9 R. 482; *Kish v. Taylor*, [1912] A.C. at p. 614.

<sup>5</sup> *Gullischen v. Stewart*, 1884, 13 Q.B.D. 317.

<sup>6</sup> *Thomas & Co. v. Portsea S.S. Co.*, [1912] A.C. 1.

bills of lading are to be conclusive evidence of the cargo shipped.<sup>1</sup> Similarly, if the bill of lading contains a clause of exceptions, that will not be extended by reference to the corresponding clause in the charter-party.<sup>2</sup> The principle in such a case is that the indorsee is not bound to examine the charter-party with reference to matters which are expressly dealt with in the bill of lading.

(viii) *Partial Incorporation of Charter-Party.*

141. In exceptional cases, the responsibility which the consignee undertook in accepting a bill containing a clause incorporating the conditions of the charter-party was so onerous, that shippers frequently attempted to induce the shipmaster to grant a bill of lading in which the charter-party was only referred to as a means of ascertaining the freight. In such a case the stipulated lien for demurrage at the port of loading, or for dead freight, could not be enforced against the consignee; and as the charter-party usually contained a cesser clause, the charterer who induced the shipmaster to sign a bill of lading in such terms might also escape liability. To protect against this injustice, charterers who desired to have a readily negotiable bill of lading have been obliged to limit the effect of the cesser clause, so as not to discharge their liability in respect of demurrage or other claims which had already accrued.<sup>3</sup> Where the bill of lading makes no reference to the charter-party except for the purpose of ascertaining the freight, the goods are not liable for demurrage or dead freight, even though the indorsee had notice of claims made by the ship at the time when he acquired right to the bill of lading.

(ix) *Effect of not Incorporating Charter-Party.*

142. The effect of omitting the clause incorporating the conditions of the charter-party is that the bill of lading, as between the shipowner and the indorsee, contains the whole contract of carriage,<sup>4</sup> except in special circumstances where the indorsee has notice of the terms of the charter-party.<sup>5</sup> The mere granting of the bill of lading, however, does not supersede the charter to the effect of preventing the charterer, while he remains the owner of the cargo shipped, from founding on the charter-party as in a question with the shipowner.<sup>6</sup> As between the original parties, the charter-party is regarded as the contract, and the bill of lading as a mere receipt for the goods. But where a bill issued to a shipper other than the charterer comes into the charterer's hands

<sup>1</sup> *Hogarth v. Blythe, Green, Jourdain & Co.*, [1917] 2 K.B. 534; but see *Fort Shipping Co. v. Pederson & Co.*, 1924, 19 Ll.L. Rep. 26.

<sup>2</sup> *Delaurier v. Wyllie*, 1889, 17 R. 167.

<sup>3</sup> See Demurrage, *infra*, para. 176 *et seq.*

<sup>4</sup> *Turner v. Goolam*, [1904] A.C. 826.

<sup>5</sup> *The "Draupner"*, [1910] A.C. 450; Scrutton, 12th ed., p. 65.

<sup>6</sup> *Rodocanachi v. Milburn Bros.*, 1886, 18 Q.B.D. 67.

by indorsation he is bound by its terms and cannot treat it as a mere receipt.<sup>1</sup> Where there is no cesser clause in the charter-party, the shipowner can still maintain an action against the charterer for unimplemented obligations incurred by him under the charter-party, even although he has delivered the cargo to indorsees of bills of lading under which they undertook no liability for these obligations.

(x) *Liability of Indorsee for Freight.*

**143.** The indorsee who presents the bill of lading and receives from the shipmaster delivery of the goods, becomes thereby liable for the freight, even if it should exceed the value of the goods themselves. But an indorsee who has himself indorsed over the bill of lading to a third party, is not liable for the freight from the mere fact that for a time he held the right of property in the goods symbolised by the bill of lading.<sup>2</sup> So a pledgee of the bill of lading is not liable for the freight unless he receives the cargo—the argument, founded upon the words of s. 1 of the Bills of Lading Act, 1855,<sup>3</sup> that the property in the goods had passed to him by reason of the indorsement being rejected.<sup>4</sup> Nor is the holder of a bill of lading, which represents the freight to have been paid, liable for freight, although no actual payment has been received by the shipowner.<sup>5</sup> Even a person who receives the cargo is not answerable for the freight, if it is known to the master that he is acting only as agent of the consignor; <sup>6</sup> the master's remedy in such a case is the lien which the common law gives him to retain the goods until the freight is paid. Where, however, the agent holds himself out as receiver under the bill of lading, he will be personally liable for the freight. In no case is the owner of cargo, who receives it by agents, relieved from liability unless the shipowner has expressly assented to take some other debtor in his place, and he cannot escape such liability by abandoning the cargo.<sup>7</sup>

(xi) *Where no Charter-Party—"General Ships."*

**144.** In the cases which have been hitherto dealt with in this section, the bill of lading has always followed upon a charter-party. In the case of general ships, however, it is now usual for the bill of lading granted for each parcel of goods to be the only document containing or evidencing the contract of carriage between the shipper and shipowner. Such bills of lading generally contain very elaborate clauses exempting the shipowner from liability. To be effectual against the shipper, however, it must be shewn that he knew the terms upon which the shipowner

<sup>1</sup> *Calcutta S.S. Co. v. Weir*, [1910] 1 K.B. 759.

<sup>2</sup> *Smurthwaite v. Wilkins*, 1862, 11 C.B. (N.S.) 842.

<sup>3</sup> 18 & 19 Vict. c. 111.

<sup>4</sup> *Sewell v. Burdick*, 1884, 10 App. Ca. 74.

<sup>5</sup> *Howard v. Tucker*, 1831, 1 B. & Ad. 712.

<sup>6</sup> *Amos v. Temperley*, 1841, 8 M. & W. 798.

<sup>7</sup> *Dakin v. Oxley*, 1864, 33 L.J.C.P. 115; see Freight, para. 170, *infra*.



contracted—as expressed in the ordinary form of the bill of lading employed by him, and expressly or impliedly assented to these terms when he put the goods on board. A shipowner who puts up his ship as a general ship, or who runs a line of ships from ports to ports, habitually carrying all goods brought to him, is a common carrier.<sup>1</sup>

SUBSECTION (2).—*Bill of Lading as a Document of Title.*

145. The use of the bill of lading as a document of title dates from an early period in its history. So far back as 1794 it was decided in the case of *Lickbarrow v. Mason*,<sup>2</sup> that by the custom of merchants, which custom had been uniform for one hundred years preceding the judgment, the legal property in goods specified in a bill of lading was effectually passed upon indorsement or assignment. This doctrine, however, must be taken with the qualification that it was the intention of the parties that the property should pass when the indorsement or assignment was executed.<sup>3</sup> The bill of lading is no doubt the symbol of the goods, but its transfer has no greater effect than the handing over of the goods themselves, which may either be by way of pledge, mortgage, or simple custody on behalf of the transferor.

(i) *Stoppage in transitu.*

146. One of the most important consequences of this doctrine is, that a *bona fide* indorsement for value of the bill of lading by the vendee passes the property in the goods and defeats the vendor's right of stoppage *in transitu*. The vendor, however, usually guards against this risk by not parting with the bill of lading until he has received the stipulated cash or acceptances of the consignee. Banks are now generally used as agents for foreign shippers in the delivery of bills of lading in exchange for the price, or part of the price, which the consignee has undertaken to pay. Where the vendor retains the document of title, his right to stop *in transitu* remains.

(ii) *Consignee's Right of Action.*

147. Owing to a curious technicality of English law, although the property in the goods specified in the bill of lading passed to the onerous indorsee, the contract with the carrier, of which it was the evidence, was not transferred. The result was that the indorsee could not maintain an action against the shipowner for not delivering the goods, or for damages for short delivery or the like. The Bills of Lading Act of 1855,<sup>4</sup> however, simplified the relations of parties by enacting as follows:

<sup>1</sup> *Nugent v. Smith*, 1876, 1 C.P.D. 19. See General Ship, *supra*. (For the responsibilities and liabilities of the shipowner under bills of lading to which the Carriage of Goods by Sea Act, 1924, applies, see *infra*, para. 218.)

<sup>2</sup> 1794, 5 T.R. 63.

<sup>3</sup> *Sewell v. Burdick*, 1884, 10 App. Ca. 74.

<sup>4</sup> 18 & 19 Vict. c. 111.



(Section 1) "Every consignee of goods named in the bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such assignment or indorsement, shall have transferred to or vested in him all rights of suit, and shall be subject to the same liability in respect of such goods as if the contract contained in the bill of lading had been made with himself."

(iii) *Can Indorsee have a Higher Right than Shipper?*

**148.** This is a question not free from doubt, looking to the opinions expressed in the case of *Craig & Rose v. Delargy*.<sup>1</sup> In one case, however, in England, the question was answered in the affirmative.<sup>2</sup> In that case the charterer of the vessel shipped goods on board of it, and received a bill of lading from the master. He saw and acquiesced in the way in which the goods were stowed. The method of stowage was, however, improper, and the goods were in consequence damaged on the voyage. The indorsee was held entitled to maintain an action of damages against the shipowner in respect of the improper stowage, although it was plain that the original shipper would have been barred by acquiescence.<sup>3</sup> The view taken seems to be, that what is transferred is not the right of the shipper as an individual or as charterer, but his position under the contract evidenced by the bill of lading.

**149.** In contracts to which the Carriage of Goods by Sea Act, 1924, applies where a charterer who is also the shipper indorses bills of lading, the contract contained therein is brought under the provisions of the rules. In such cases the indorsee may receive a higher right than the shipper by indorsation.

SUBSECTION (3).—*Bill of Lading as a Security-Writ.*

(i) *Indorsement in Security.*

**150.** The preceding observations apply to the case where the entire property in the goods passes from the shipper to the consignee by indorsement and delivery of the bill of lading: but as moveables of any kind can be deposited under a contract of pledge, so it is competent to use the bill of lading as a security-writ to cover advances made to the holder. When the bill of lading is so used, the property passes to the indorsee to the effect only of enabling him to operate payment of his claim out of the security-subjects, leaving him liable to account for the balance to the prior holder. If the advances are repaid by the borrower before the bill of lading is presented, the indorsee is bound to

<sup>1</sup> 1879, 6 R. 1269; and see *Hunter, Craig & Co. v. Ropner & Co.*, 1909, 1 S.L.T. 41.

<sup>2</sup> *Ohrloff v. Briscall (The "Helene")*, 1866, L.R. 1 P.C. 231; B. & L. 415; and see *Leduc v. Ward*, 1888, 57 L.J. Q.B. 379; 20 Q.B.D. 475; Carver, 7th ed., ss. 63 *et seq.*; para. 137, *supra*, note 4.

<sup>3</sup> *Ohrloff v. Briscall, supra*.

re-indorse it to him, and the latter's rights against the shipowner are in no way affected by the fact that, during a portion, or perhaps the whole, of the voyage, the title to the goods has been in another.

151. An indorsement which operates simply as a pledge of the goods leaves in the unpaid vendor the right of stoppage *in transitu* of the property remaining in the borrower who, *ex hypothesi*, has never absolutely parted with the property in the goods. But this right cannot be exercised so as to affect prejudicially the interest of the indorsee, who is entitled to realise the goods, and to pay himself out of the proceeds, before the vendor can claim any part of the price. This is, of course, subject to the ordinary rules of bankruptcy, which apply to securities constituted by transfer or indorsement of bills of lading, in the same way as to the indorsement of bills of exchange. Thus, if granted for a prior debt within sixty days of bankruptcy, such indorsements are reducible under the Act 1696, c. 5. But the fact that the indorsee knows the goods have not been paid for will not prevent him from claiming the benefit of his security in a question with the unpaid vendors or other creditors of the vendee. The indorsement and transfer in security of bills of lading constitutes a valid security even over unascertained goods immixed with others.<sup>1</sup>

(ii) *Evidence as to Purpose of Indorsement.*

152. A transfer of a bill of lading for a past debt is sufficient to support the right of the transferee who acquired the property in good faith ;<sup>2</sup> and the delivery of the indorsed bill of lading is *prima facie* evidence of the transfer of the entire property. But the true cause of the indorsement—as by way of pledge, mortgage, etc.—may be proved by anyone having an interest to do so.

SUBSECTION (4).—*Incidents of the Contract.*

(i) *Bills of Lading drawn in Sets.*

153. Bills of lading are usually drawn in sets of three, under the proviso expressed in the typical bill of lading to the effect that if one is accomplished, the others are to stand void. This is done for the convenience of shippers or merchants, and to guard against the risk of loss of the document of title if only one is signed by the master. The practice has, however, occasionally been turned to account by fraudulent shippers so as to obtain advances from different persons on the security of the same goods. The master of the ship is in safety if he delivers to the indorsee who first presents his bill of lading, without notice that there is a competing claim.<sup>3</sup> But if he is made aware, before parting with the goods, that there are competing claimants,

<sup>1</sup> *Hayman & Son v. M'Lintock*, 1907 S.C. 936. (As to the liability of the pledgee for payment of freight, see para. 143, *supra*.)

<sup>2</sup> *Leask v. Scott*, 1877, 2 Q.B.D. 376.

<sup>3</sup> *Glyn v. East and West India Dock Co.*, 1882, 7 App. Ca. 591.

he must deliver to the rightful holder, or follow the safer course of declining to choose between them, and simply discharge the goods into a public warehouse, subject to his own lien for freight, demurrage, etc. The master is not entitled to deliver to the consignee named in the bill of lading without production of the bill of lading.<sup>1</sup> But he is not justified in retaining the goods on board and claiming demurrage if an indemnity is offered or if it is practicable to discharge into warehouse.<sup>2</sup> As between the indorsees, the one who first claims the indorsement for value is entitled to delivery of the goods.

(ii) *Master's Refusal to Sign Bills of Lading.*

**154.** Disputes not infrequently arise between shippers and the master as to the terms of the bills of lading which are presented for the master's signature. As a general rule, it may be stated that the master is not bound to sign a bill of lading which, taken in conjunction with the cesser clause of the charter-party, will have the effect of discharging liabilities which the charterer has already incurred to the ship. The common condition in the charter-party, "that captains shall sign bills of lading as presented at any rate of freight without prejudice to the charter-party," imports that the charterer may insert a different rate of freight from that stipulated in the charter-party, but not any other departure from its terms.<sup>3</sup> Where the master is bound to sign bills "as required by the charterers without prejudice to the charter-party" the charterer must tender bills which are consistent with the charter.<sup>4</sup>

**155.** On the other hand, the master is not entitled to insert stipulations in the bill of lading in favour of the ship which are not warranted by the charter-party. His refusal to sign a bill of lading, except on such a footing, is a breach of the charter-party.<sup>5</sup> And if he wrongfully sails away with the cargo without granting a bill of lading, he is liable as for a conversion. On the other hand, if he sails with the intention of delivering the cargo to the consignee named in the bills of lading, and without objection on the part of the consignor, he may not be guilty of conversion. He would be so if the cargo owner had refused to allow the cargo to go on the voyage without a bill of lading, and had demanded that it should be discharged and returned to him.

(iii) *Master's Authority to vary Contract of Carriage.*

**156.** The master has no authority to vary the contract which the owner has already made, by signing bills of lading differing from the charter-party. But if he does so, and the bill of lading is transferred to a *bona-fide* holder for value, the shipowner will, in the general case,

<sup>1</sup> *The "Stettin,"* 1889, 14 P.D. 142.

<sup>2</sup> *Carlberg v. Wemyss Coal Co.*, 1915 S.C. 616.

<sup>3</sup> *Arrospe v. Barr*, 1881, 8 R. 602.

<sup>4</sup> *Kruger v. Moel Tryvan Ship Co.*, [1907] A.C. 272; *The "Draupner,"* [1910] A.C. 450.

<sup>5</sup> *Jones v. Hough*, 1879, L.R. 5 Ex. D. 115.



be bound, as in a question with the latter, by the terms of the bill of lading. He will, however, not be bound if the variations are clearly beyond the ordinary powers of a master—as if the master contracts to carry goods freight-free;<sup>1</sup> or if he makes the freight under the bill of lading payable to a third party other than the owner.<sup>2</sup> Even if the master succeeds in getting the shipper to accept a bill of lading which is more favourable to the ship than the charter-party, the alteration will not avail the shipowner.<sup>3</sup>

### SECTION 5.—FREIGHT.

#### SUBSECTION (1).—*Definition.*

**157.** In the sense here used, freight proper is an agreed-on or, failing agreement, or if the agreement becomes inapplicable, the reasonable reward for the carriage of goods in ships, dependent on the delivery of, or the ability of the ship to deliver, the goods at their destination. *Dead Freight*<sup>4</sup> is in substance a claim of damages for the loss of freight. *Back Freight* or *Farther Freight* is the compensation a ship is entitled to if, after carrying the goods to their destination, and waiting a reasonable, or the agreed-on, time to deliver them, she, acting reasonably, brings them back to the port of loading, or to another port than the agreed-on port of discharge, to get rid of them.<sup>5</sup>

#### SUBSECTION (2).—*When due.*

**158.** In all cases the ship earns her freight when she brings the goods to the proper place of discharge, and is ready and able to give delivery within the agreed-on, or reasonable, time for discharge. In a case where the charter gave a lien for freight, and also made provision for the receiver of the cargo checking the weight of the cargo delivered before he paid the freight, it was held that it was for the parties to make reasonable arrangements so as to give effect to both provisions.<sup>6</sup> This decision illustrates the well-settled rule, that where freight is payable on delivery, payment of freight and delivery are concurrent acts, to be reasonably done by the parties so as to give effect to the whole contract.<sup>7</sup> Weighing or measuring to ascertain the amount of freight payable, in the absence of custom or agreement, falls on the ship.<sup>8</sup> But in Scotland, in the grain trade, it has been held there is a custom for the merchant to bear the expense.<sup>9</sup>

<sup>1</sup> *Grant v. Norway*, 1851, 10 C.B. 665; *The "Draupner,"* [1910] A.C. 450.

<sup>2</sup> *Reynolds v. Jex*, 1865, 7 B. & S. 86.

<sup>3</sup> *Rodocanachi v. Milburn Bros.*, 1886, 17 Q.B.D. 316.

<sup>4</sup> See para. 174, *infra*.

<sup>5</sup> See, e.g., *Cargo ex "Argos,"* 1873, L.R. 5 P.C. 134.

<sup>6</sup> *Vogeman v. Bisley*, 1897, 2 Com. Ca. 81.

<sup>7</sup> *Thorsen v. M'Dowall & Neilson*, 1892, 19 R. 743.

<sup>8</sup> *Coulthurst v. Sweet*, 1866, L.R. 1 C.P. 649; *Merryweather v. Pearson*, [1914] 3 K.B. 587; also *Dampskibsselskabet Svendborg v. Love & Stewart*, 1916 S.C. (H.L.) 187.

<sup>9</sup> *Watts, Ward & Co. v. Grant & Co.*, 1889, 26 S.L.R. 660.



SUBSECTION (3).—*Special Modes of Calculation.*

**159.** While the principle that freight is dependent on the carriage of the goods to their destination underlies much of the law of the contract of affreightment, there is nothing to prevent parties making any lawful bargain on the subject. Accordingly, every variety of provision is made, alike as to the mode of calculating the ship's reward, the time of payment, and the use given of the ship.

(i) *Rate Freight.*

**160.** A rate freight, that is, a freight calculated on the weight or quantity of the goods carried, is the ordinary case where loss of the goods or any part thereof entails a corresponding loss of freight.

(ii) *Lump Freight.*

**161.** Where a ship is paid a single sum for the use of the ship by the goods agreed to be carried, there is no deduction from the freight if only part of the goods are lost. If any part is delivered the *cumulo* sum is due.<sup>1</sup> The case of the *London Transport Co. v. Trechmann*<sup>2</sup> may be referred to on the question whether or not the charter is one for a lump sum freight. The presumption seems to be against this, and clear words must be used.

(iii) *Time Freight.*

**162.** Sometimes the merchant hires the ship for a period of time, and the hire is an agreed-on sum based on time. It is generally bargained that the hire is to be paid weekly or monthly in advance, but a lien for any unpaid hire is also bargained for. The hire is payable though the ship may have been so damaged by sea perils, or other cause for which the owners are not responsible, as to be unfit for use for a time, unless there is a contrary agreement. But such agreement is now always to be found in time charters.<sup>3</sup> Where the freight was payable monthly in advance, but was only to be paid for the time taken by the charterer, the charterer was held bound to pay a whole month's hire in advance when it was clear he would not keep the ship for the whole month.<sup>4</sup>

(iv) *Advance Freight.*

**163.** Frequently there is provision for payment of freight in advance or for advances against freight to meet disbursements.<sup>5</sup> By the law of

<sup>1</sup> *Robinson v. Knights*, 1873, L.R. 8 C.P. 465; *Merchant Shipping Co. v. Armitage*, 1873, L.R. 9 Q.B. 99; *Thomas v. Harrowing S.S. Co.*, [1915] A.C. 58.

<sup>2</sup> [1904] 1 K.B. 635.

<sup>3</sup> See *Hogarth v. Miller*, [1891] A.C. 48.

<sup>4</sup> *Tonnelier, and Bolckow, Vaughan & Co. v. Smith*, 1897, 2 Com. Ca. 258; see *Reindeer S.S. Co. v. Forslind*, 1908, 13 Com. Ca. 214; see Charter-party, para. 91 *et seq.*, *supra*.

<sup>5</sup> *Smith, Hill & Co. v. Pyman*, [1891] 1 Q.B. 42, 792; *The "Primula,"* [1894] P. 128; *Weir & Co. v. Girvin*, [1900] 1 Q.B. 45.

England such payments are not recoverable if the ship be lost upon the chartered voyage.<sup>1</sup> By the law of Scotland, however, an advance of freight is recoverable in the event of loss unless the charter contains a stipulation to the contrary either express or implied.<sup>2</sup>

(v) *Other Special Bargains.*

**164.** In the general case the shipowner is not entitled to the agreed-on freight unless he carries out his contract and delivers the goods.<sup>3</sup> Full freight may be claimed,<sup>4</sup> however, if delivery be prevented by fault of the charterer, *e.g.* in failing to name a safe port. Freight *pro rata itineris* can be demanded if, on the facts of the case, it is held there has been an agreement, express or implied, on the part of the merchant, to take delivery of the goods at a port short of the destination, and to pay *pro rata* freight therefor.<sup>5</sup> If the merchant requires delivery of the goods at a port other than the port of destination, the shipowner being able and willing to make delivery at that port, full freight will be due. If the ship is damaged by excepted perils, the owner may tranship the goods and deliver them, and so earn the freight. Freight is due however damaged the goods may be, unless, indeed, they have lost their identity.<sup>6</sup> If the ship is abandoned, no freight is due though the ship is brought in and the goods delivered.<sup>7</sup>

**165.** By the terms of the charter the freight may be payable in any event, ship lost or not lost.<sup>8</sup>

In the absence of indication in the contract or usage to the contrary, freight is payable on the quantity shipped in cases where the goods, owing to expansion or shrinkage, are larger or smaller at the port of discharge compared with the port of shipment;<sup>9</sup> but the matter is now generally determined by contract. Under a charter where freight was payable on the cargo as measured at the port of loading and there had been no such measurement made, freight was held to be payable on the quantity delivered and not on the quantity shewn in the bill of lading.<sup>10</sup>

**166.** If the master grants a number of bills of lading and inserts therein the freight payable in respect of the particular goods, the owner will, in a question with third parties, only have right to hold the goods

<sup>1</sup> *Oriental S.S. Co. v. Tylor*, [1893] 2 Q.B. 518.

<sup>2</sup> *Watson & Co. v. Shankland*, 1871, 10 M. 142; *Cantiere San Rocco v. Clyde Ship-building and Engineering Co.*, 1923 S.C. (H.L.) 105; Scrutton, 12th ed., p. 381.

<sup>3</sup> *Metcalfe v. Britannia Ironworks Co.*, 1878, 2 Q.B.D. 423.

<sup>4</sup> *Aktieselskabet Olivebank v. Dansk Svovlsyre Fabrik*, [1919] 2 K.B. 162.

<sup>5</sup> *The "Soblomsten"*, 1866, L.R. 1 A. & E. 297.

<sup>6</sup> *The "Kathleen"*, 1874, L.R. 4 A. & E. 269; *The "Arno"*, 1895, 11 T.L.R. 453; *Bradley v. Newsum*, [1919] A.C. 16.

<sup>7</sup> *Dickson v. Buchanan*, 1876, 13 S.L.R. 401; *Asfar v. Blundell*, [1896] 1 Q.B. 123.

<sup>8</sup> *Leitch v. Wilson*, 1868, 7 M. 150; and for the construction of variations of this clause, see *Pacific Steam Navigation Co. v. Thomson, Aikman & Co.*, 1920 S.C. (H.L.) 159.

<sup>9</sup> *Gibson v. Sturge*, 1855, 10 Ex. 622.

<sup>10</sup> *The New Line S.S. Co. v. Bryson & Co.*, 1910 S.C. 409.

for the freight payable therefor. So, if the charter freight is a rate freight, say per ton, the goods can only be held for the freight applicable to the parcel, unless the bill of lading clearly gives a lien for the whole freight.<sup>1</sup> But in a Scottish case this was held to have been done by a reference to "other conditions as per charter-party," though a rate freight was specified.<sup>2</sup> In the case of a lump freight, the shipowner may hold any one parcel for the whole chartered freight. A claim for freight may be met by a counter claim for damage to cargo.<sup>3</sup>

**167.** Various questions bearing on freight arise at the instance of the shipowner, or the merchant; questions relative to the capacity of the ship; the duty of the merchant to load the ship with the specified cargo, so as to give the shipowner the freight he had in contemplation;<sup>4</sup> what constitutes a full cargo; the mode of calculating the freight, etc. Cases include questions as to mode of calculating freight, measurement, increase of cargo in bulk on voyage, freight rate,<sup>5</sup> lawful merchandise;<sup>6</sup> freight measurement, loss of part of cargo;<sup>7</sup> recovery of owner's freight from charterer's bill of lading freight;<sup>8</sup> freight for vacant space;<sup>9</sup> charterer's right to increased freight payable under supplementary agreement between ship and sub-charterers;<sup>10</sup> carrying capacity of ship;<sup>11</sup> carrying capacity, full and complete cargo.<sup>12</sup> The question of the amount of freight due is discussed generally in the textbooks.<sup>13</sup> In these cases the real question is what is the true meaning of the contract made by the parties, and it is not necessary to set forth the particular facts of each. The principle deducible from them all is, that the Court will construe the charter so as to give effect to what, having regard to the whole circumstances, and the words used, is held to be the reasonable intention of parties.

(vi) *Through Freight.*

**168.** Through freight is the term applied to the charge for carriage where the services of two or more carriers in succession are required for the conveyance and delivery of the goods—generally a land and sea transit. One payment is made for the whole carriage. Sometimes one person makes himself liable for performance of the whole contract. In other cases each carrier is liable for his own portion of the transit only.<sup>14</sup>

<sup>1</sup> *Gardner & Sons v. Trechmann*, 1884, 15 Q.B.D. 154.

<sup>2</sup> *Lamb v. Kaselack, Alsen & Co.*, 1882, 9 R. 482.

<sup>3</sup> *Taylor v. Forbes*, 1830, 9 S. 113.

<sup>4</sup> *Steven v. Bromley*, [1919] 2 K.B. 722.

<sup>5</sup> *Buckle v. Knoop*, 1867, L.R. 2 Ex. 333.

<sup>6</sup> *Southampton Steam Colliery Co. v. Clarke*, 1870, L.R. 6 Ex. 53.

<sup>7</sup> *Spaight v. Farnworth*, 1880, 5 Q.B.D. 115.

<sup>8</sup> *Janentzky v. Langridge*, 1895, 1 Com. Ca. 90.

<sup>9</sup> *Potter v. New Zealand Shipping Co.*, 1895, 1 Com. Ca. 114.

<sup>10</sup> *Hoyland & Co. v. Graham & Co.*, 1896, 1 Com. Ca. 274.

<sup>11</sup> *Carnegie v. Conner*, 1889, 24 Q.B.D. 45; *Mackill v. Wright*, 1888, 14 App. Ca. 106.

<sup>12</sup> *S.S. "Heathfield" Co., Ltd. v. Rodenacher*, 1896, 2 Com. Ca. 55.

<sup>13</sup> Scrutton, 12th ed., 39; Carver, 7th ed., ss. 574 *et seq.*

<sup>14</sup> See e.g., of a through contract, *The Ocean S.S. Co v. National S.S. Line*, 1891, 7 T.L.R. 417; *Crawford & Law v. Allan Line*, 1912 S.C. (H.L.) 56.



SUBSECTION (4).—*To Whom payable.*

169. Freight may be due to the shipowner or his assignee; to a mortgagee, if he enters into possession before the contract of affreightment has been fulfilled by the ship's completion of her voyage; to a charterer; in short, to whomsoever the cargo-owner has agreed to pay the freight, or to anyone in his right.<sup>1</sup> The rule as to the right of set-off and counter-claim as against assignees has been laid down in England as follows: "Unliquidated damages may now be set off as between the original parties and also against an assignee if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment."<sup>2</sup> It is thought that the rule in Scotland is at least as liberal in favour of the charterer as is that above stated. In the case of a mortgagee, where the shipowner had carried his own goods and entered in the bill of lading a nominal freight, and indorsed it, the mortgagee was held not entitled to claim a reasonable freight, as the shipowner, until the mortgagee takes possession, can use the ship reasonably as he sees fit.<sup>3</sup>

SUBSECTION (5).—*By Whom payable.*

170. Freight is payable by: (a) the shipper or person who makes the original contract under which the goods are carried, who remains liable throughout, unless he bargains to the contrary; nor, unless he has so bargained, can he complain if the shipowner, neglecting to take advantage of his lien, enforces payment from him, and him only;<sup>4</sup> (b) at common law, by the person who receives the goods, where the ship waives the lien which she has to secure freight, on a condition which the law then implies that the freight will be paid by the receiver. Where, however, the goods have been warehoused to preserve the lien for freight, and under the provisions of the Merchant Shipping Act the consignee has obtained delivery by paying to the warehouseman the sum for which the goods are held, there is no implied obligation on his part to pay freight further;<sup>5</sup> (c) by the consignee named in the bill of lading, and by the indorsee or holder of the bill of lading if the property has passed to him under the Bills of Lading Act, 1855. If the indorsee parts with the bill of lading prior to delivery of the goods, he ceases to be liable. The question which frequently arises in this last case is whether or not the indorsement has passed the property in the goods to the indorsee or whether he is only an agent to receive the goods.<sup>6</sup> And (d) by the vendor who stops *in transitu*.<sup>7</sup>

<sup>1</sup> Scrutton, 12th ed., pp. 408 *et seq.*

<sup>2</sup> *Newfoundland Government v. Newfoundland Rly. Co.*, 1888, 13 App. Ca. 199; also *Samuel & Co. v. West Hartlepool Steam Navigation Co.*, 1907, 12 Com. Ca. 203.

<sup>3</sup> *Mercantile Bank v. Gladstone*, 1868, L.R. 3 Ex. 233.

<sup>4</sup> *Shepard v. De Bernales*, 1811, 13 East, 565.

<sup>5</sup> *Furness Withy Co., Ltd. v. White*, [1895] A.C. 40.

<sup>6</sup> See, e.g. *Cross & Son v. Bordes*, 1879, 16 S.L.R. 539.

<sup>7</sup> *Booth S.S. Co. v. Cargo Fleet Iron Co.*, [1916] 2 K.B. 570; see Scrutton, 12th ed., pp. 417 *et seq.*; Carver, 7th ed., ss. 602 *et seq.*



SUBSECTION (6).—*Lien*.

171. At common law the owner has a possessory lien over the goods on board for the freight. He may by the terms of the charter waive the lien, *e.g.* by agreeing to take payment on terms inconsistent with his retaining possession till the freight is paid.<sup>1</sup> The common law lien for freight is for freight proper, and does not extend to cases of payment, *e.g.* of a sum, ship lost or not lost, because this is not freight proper, as it is payable whether the services are rendered or not.<sup>2</sup>

172. Special provision is made by the Merchant Shipping Act, 1894, for the owner preserving possession while landing the goods.<sup>3</sup> There is also a lien for general average contributions due by cargo, or for special expenses incurred in preserving the cargo, but not impliedly for other claims by the shipowner, though it is common to contract for a lien for demurrage and in certain other cases, and this is competent.<sup>4</sup>

SUBSECTION (7).—*Insurance and Average*.

173. Freight is insured *eo nomine*. What constitutes a loss by the perils insured against and the mode of adjustment in case of loss will be treated of under INSURANCE (MARINE).

As to how far freight contributes to general average, see AVERAGE.

SUBSECTION (8).—*Dead Freight*.

174. Dead freight is the name applied to the sum payable as damages by the charterer of a ship to the shipowner in respect of stow-room which he has failed to fill up with cargo in accordance with the charter-party. Strictly, this is not freight, but "compensation for the loss of freight, recoverable in the absence and place of freight."<sup>5</sup> In some cases the amount so payable is ascertained or ascertainable from the charter-party. More frequently it has to be estimated by an average, allowance being made for expense saved to the owner by the short shipment, and for any profit which may have been made by carrying the goods of other persons. The shipowner's lien over cargo for freight does not, at common law, cover dead freight, but is often extended to do so by the terms of the charter-party. It has been questioned, in English cases, whether the term "dead freight," so used in a charter-party, is not to be limited to liquidated damages ascertained from the charter-party itself. The House of Lords, however, have laid down in a Scottish case, that an unliquidated sum may be covered where that is clearly contracted for.<sup>6</sup>

<sup>1</sup> *Tamvaco v. Simpson*, 1866, L.R. 1 C.P. 363.

<sup>2</sup> See Scrutton, 12th ed., p. 421.

<sup>3</sup> Ss. 494 *et seq.*

<sup>4</sup> See Scrutton, 12th ed., pp. 426 *et seq.*

<sup>5</sup> *Phillips v. Rodie*, 1812, 15 East, 547, per Lord Ellenborough.

<sup>6</sup> *M'Lean and Hope v. Fleming*, 1871, 9 M. (H.L.) 38; *Kish v. Taylor*, [1912] A.C. 604, at 614; contrast *Gray v. Carr*, 1871, L.R. 6 Q.B. 522.

It has been decided that in an action by charterers for repetition of a sum paid as freight for goods which had not in fact been carried, the shipowner was entitled to set off a similar sum claimed by him as dead freight for failure to load the goods in question.<sup>1</sup>

#### SUBSECTION (9).—*Primage or Hat-money.*

**175.** This is a payment in the nature of a gratuity made by the freighter to the master of a ship upon delivery of the cargo. The leading case on the subject is *Howitt v. Paul, Sword & Co.*<sup>2</sup> Two questions were raised in this case: (*first*) Whether the master of a ship was entitled to primage under a charter-party which made express mention of a gratuity to the captain "on good delivery of the cargo," and a subsequent bill of lading which was to the effect that the goods were to be delivered, "assigns paying freight for said goods as per charter-party"? and (*second*) Whether the claim, supposing it to be good, was forfeited in respect that the goods were not safely carried? Both questions were answered by the Court in the affirmative, the latter on the ground that where freight has been earned by the owner, primage has been earned by the master.<sup>3</sup>

### SECTION 6.—DEMURRAGE.

#### SUBSECTION (1).—*Definition.*

**176.** The term is applied to the sum payable by the charterer of a ship to the shipowner, as fixed by the charter-party, as compensation for the detention of the vessel in port beyond the "lay days," *i.e.* the period allowed without charge for loading or unloading the cargo, or for both these purposes. In contracts to which the Carriage of Goods by Sea Act, 1924, applies, it is not thought that the provisions of Article IV. 3 will have the effect of interfering with the freedom of contract between skipper and carrier as to lay days and demurrage. The charter-party usually specifies a rate per day or hour during which the vessel may thus be detained, either for a fixed number of days or hours, or in such terms as to cover any period during which the detention may continue. A period so fixed is itself sometimes called demurrage.

#### SUBSECTION (2).—*When due.*

**177.** Where a charter-party provides that demurrage shall be paid after the expiry of the time for loading, but no period is specified during which the ship may be kept on demurrage, the charterer

<sup>1</sup> *Henderson & Co. v. Turnbull & Co.*, 1909 S.C. 510.

<sup>2</sup> 1877, 5 R. 321.

<sup>3</sup> Bell, Com. i. 614; Bell, Prin. s. 420; Brodie, Supp. to Stair, 1001.

is entitled to keep her on demurrage for a reasonable time to complete loading.<sup>1</sup> Under such a charter, where the specified rate of discharge has not been maintained and the lay days have expired it has been held that the shipowner may take steps to minimise the delay and can recover the outlay thus incurred by him to the extent of the demurrage saved.<sup>2</sup> When there is no terminus fixed at which the demurrage shall cease and the ship has been at the port of loading on demurrage beyond a reasonable time, the shipowner cannot claim damages for detention after the lapse of such reasonable time; his remedy is to take the ship away, and if he allows her to remain he can only claim the agreed demurrage rate.<sup>3</sup>

178. Where the detention lasts beyond the period stipulated for demurrage, or where, in the absence of any stipulation as to demurrage, it exceeds the time allowed for loading or unloading, the shipowner is entitled to "damages for detention"—an unliquidated claim, which, as being "of the nature of demurrage," is commonly included under that name.<sup>4</sup> The damages in such cases are to be assessed according to all the circumstances. A liquid sum, fixed for demurrage by the charter-party, *prima facie* supplies the measure of damages for detention.

179. Where the charter-party provides that the ship shall be loaded or unloaded in a specified time (or at a fixed rate from which the time for loading or unloading may be ascertained), that is an absolute and unconditional obligation, for the non-performance of which the charterer is liable, unless his failure is due to the default of the shipowner or of those for whom he is responsible, or is due to a cause which is covered by an exemption contained in the charter-party.<sup>5</sup> Where the charterer relies on an exemption, a distinction must be drawn between his obligation to load and his obligation to provide a cargo. *Prima facie* the charter-party exemptions apply only to hindrances of the kind specified which delay the actual work of loading, and do not apply to hindrances which prevent or delay the provision of the cargo, or its transit to the spot where the loading takes place.<sup>6</sup>

<sup>1</sup> *Wilson and Coventry Line, Ltd. v. Otto Thoreson's Linie*, [1910] 2 K.B. 405.

<sup>2</sup> *Cazalet v. Morris & Co.*, 1916 S.C. 952.

<sup>3</sup> *Western S.S. Co. v. Amarel Sutherland*, [1913] 3 K.B. 366; *Inverkip Steamship Co. v. Bunge & Co.*, [1917], 2 K.B. 193.

<sup>4</sup> *Lamb v. Kaselack, Alsen & Co.*, 1882, 9 R. 482; *Harris v. Jacobs*, 1885, 15 Q.B.D. 247; *Moor Line v. Distillers Co., Ltd.*, 1912 S.C. 514; *Westoll v. Lindsay*, 1916 S.C. 782.

<sup>5</sup> *Hansen v. Donaldson*, 1874, 1 R. 1066, per Lord Ormildale at p. 1072; *Postlethwaite v. Freeland*, 1880, 5 App. Ca. 599, per Lord Selborne, L.C., at p. 608; *Granite City S.S. Co. v. Ireland & Son*, 1891, 19 R. 124, per Lord Trayner; *Allan v. Johnstone*, 1892, 19 R. 364, per Lord Pres. Robertson; *Lilly & Co. v. Stevenson & Co.*, 1895, 22 R. 278, per Lord Trayner at p. 284; *Aktieselskabet Hansa v. Alexander*, 1919 S.C. (H.L.) 122.

<sup>6</sup> *Grant v. Coverdale*, 1884, 9 App. Ca. 470; *Kay v. Field*, 1882, 10 Q.B.D. 241; *Arden S.S. Co. v. Weir*, 1905, 7 F. (H.L.) 126; *Dampskibsselskabet Danmark v. Poulsen & Co.*, 1913 S.C. 1043; *Schele v. Lumsden & Co.*, 1916 S.C. 709; *Arden S.S. Co. v. Mathwin & Sons*, 1912 S.C. 211; *Bunge y Born Co. v. Brightman & Co.*, [1925] A.C. 799; *Bassa (Owners) v. Royal Commission of Wheat Supplies*, 1924, 132 L.T. 634; but cf. *Hudson v. Edr.*, 1868, L.R. 3 Q.B. 412; and *Smith v. Rosario Nitrate Co.*, [1894] 1 Q.B. 174.



SUBSECTION (3).—*From What Date due.*

**180.** In the ordinary case the lay days do not begin to run until the ship has arrived at her destination, at the place named in the charter-party as the place to which she is to proceed.<sup>1</sup> If the named place is a wharf, the ship must have reached the wharf.<sup>2</sup> If the named place is a dock, the ship must have entered the dock, but it is not necessary that she should have got a berth.<sup>3</sup> Where the place named is a port (or other wide area), the ship must have come within the commercial limits of the port, but it is not necessary that she should have entered the dock or berth at which loading is to take place.<sup>4</sup>

**181.** Where the charter provides that the ship shall proceed to such berth as the charterer may name, the lay days do not begin to run until she has entered the berth selected by the charterer, and the charterer is not bound to select a berth which is immediately available.<sup>5</sup> The ship must not only have arrived at the named place, but she must have so done with the consent of the harbour authorities.<sup>6</sup> Although the ship has arrived at the named place, the lay days do not begin to run unless she is placed at the disposition of the charterer, and is ready so far as she is concerned to load or unload.<sup>7</sup> At the port of loading the master must give notice that the ship is ready, but this is not necessary at the port of discharge.<sup>8</sup>

**182.** Demurrage days begin to run from the expiration of the lay days. They run continuously from that point unless there is a custom of the port or an express agreement to the contrary. When there are two ports of discharge and the lay days have been exhausted at the first, demurrage is interrupted during transit to the second port.<sup>9</sup> In the ordinary case the charter-party exemptions do not apply to days on demurrage.<sup>10</sup>

**183.** A day is *prima facie* a calendar day from midnight to midnight, and not a period of twenty-four hours.<sup>11</sup> "Working days" are days on which work is usually done at the port, excluding Sundays and port

<sup>1</sup> *Nelson v. Dahl*, 1879, 12 Ch. D. 568, per Brett, L.J., at pp. 581 *et seq.*; *Leonis S.S. Co. v. Rank*, [1908] 1 K.B. 499; *Armement Adolf Deppe v. Robinson & Co.*, [1917] 2 K.B. 204.

<sup>2</sup> *Murphy v. Coffin*, 1883, 12 Q.B.D. 87; *Tharsis Sulphur, etc., Co. v. Morel*, [1891] 2 Q.B. 647.

<sup>3</sup> *Tapscott v. Balfour*, 1872, L.R. 8 C.P. 46.

<sup>4</sup> *Leonis S.S. Co. v. Rank*, *supra*; *Torkildsen v. Park, Dobson & Co.*, 1916, 2 S.L.T. 312; *Van Nierelt Goudrian & Co. Stoomvaart Maatschappij v. Forstlind & Sons*, 1925, 30 Com. Ca. 263.

<sup>5</sup> *Murphy v. Coffin*, *supra*; *Tharsis Sulphur, etc., Co. v. Morel*, *supra*; *Bulman v. Fenwick*, [1894] 1 Q.B. 179.

<sup>6</sup> See *Good & Co. v. Isaacs*, [1892] 2 Q.B. 555; *Whites v. S.S. "Winchester" Co.*, 1886, 13 R. 524.

<sup>7</sup> *Nelson v. Dahl*, *supra*; see *Whites v. S.S. "Winchester" Co.*, *supra*.

<sup>8</sup> *Nelson v. Dahl*, *supra*, per Brett, L.J., *cp.* pp. 581 and 583.

<sup>9</sup> *Breynton v. Theodoridi*, 1924, 19 Ll.L. Rep. 409; but see *Cantiere Navale Triestina v. Handelsvertretung der Russe*, [1925] 2 K.B. 172.

<sup>10</sup> *Carver*, 5th ed., 351; *Tyne and Blythe Shipping Co. v. Leech*, [1900] 2 Q.B. 12; *cp. Lilly & Co. v. Stevenson & Co.*, 1895, 22 R. 278.

<sup>11</sup> *The "Katy"*, [1895] P. 56.



holidays.<sup>1</sup> There are decisions regarding weather working days,<sup>2</sup> half-holidays,<sup>3</sup> and the number of hours in a working day.<sup>4</sup> "Running days" means consecutive days, including Sundays and holidays, and "days" are presumed to be running days.<sup>5</sup> On the question of how fractions of a day are dealt with, see *The Horsley Line v. Roechling Bros.*,<sup>6</sup> and cases there cited. Where the time is counted by hours, the hours run continuously night and day.<sup>7</sup>

**184.** Where the charter-party provides that the ship shall be loaded or discharged in a specified number of working days, and work is, in fact, done on a day which is not a working day, it is a question of fact whether the parties have agreed that the day in question should count as a lay day. In the absence of agreement it does not count as a lay day.<sup>8</sup> Where the charter-party provides that the ship shall be loaded and discharged at a certain daily rate "reversible," any time saved in loading may be added to the time allowed for discharging and *vice versa*.<sup>9</sup>

**185.** Where the charter-party does not provide that the ship shall be loaded or unloaded in a specified time, the charterer is under an implied obligation to load or discharge in a reasonable time.<sup>10</sup> It is immaterial whether general words are used, as, for instance, where it is provided that the ship shall be loaded or discharged "with all despatch as customary,"<sup>11</sup> or that she shall be discharged "as fast as steamer can deliver,"<sup>12</sup> or "as fast as steamer can deliver as customary,"<sup>13</sup> or whether the charter-party contains no provision at all upon the subject.<sup>14</sup> In all such cases the obligation of the charterer is to load or unload in a reasonable time. By a reasonable time is meant not the period which would be reasonable under ordinary circumstances, but the time which is reasonable having regard to the circumstances under which the work was actually done.<sup>15</sup> Only circumstances affecting the discharge and

<sup>1</sup> *Holman v. Peruvian Nitrate Co.*, 1878, 5 R. 657; *Nielsen v. Wait*, 1885, 16 Q.B.D. 67, per Lord Esher, M.R.; but see *British and Mexican S.S. Co. v. Lockett*, [1911] 1 K.B. 264.

<sup>2</sup> *Branchelow S.S. Co. v. Lamport*, [1897] 1 Q.B. 570.

<sup>3</sup> *Aktieselskabet Dampskibet Gimle v. Garland & Royer*, 1917, 2 S.L.T. 254; *Robert Dollar Co. v. Blood, Holman & Co.*, 1920, 4 Ll.L. Rep. 343.

<sup>4</sup> *Laing v. Hollway*, 1878, 3 Q.B.D. 437, per Bramwell, L.J.; *Mein v. Ottmann*, 1904, 6 F. 276, per Lord Trayner; *Turnbull, Scott & Co. v. Cruickshank & Co.*, 1904, 7 F. 265; *Watson S.S. Co. v. Mysore Manganese Co.*, 1910, 15 Com. Ca. 159.

<sup>5</sup> *Nielsen v. Wait*, *supra*, per Lord Esher, M.R.; *Holman v. Peruvian Nitrate Co.*, *supra*, at 671; *Rowtor S.S. Co. v. Love & Stewart*, 1916, S.C. 223, at 240.

<sup>6</sup> 1908 S.C. 866. <sup>7</sup> *Laing v. Hollway*, *supra*.

<sup>8</sup> *Nelson v. Nelson Line, Ltd.*, [1908] A.C. 108.

<sup>9</sup> See *Rowtor S.S. Co. v. Love & Stewart*, *supra*, and 1916 S.C. (H.L.) 199.

<sup>10</sup> *Postlethwaite v. Freeland*, 1880, 5 App. Ca. 599.

<sup>11</sup> *Castlegate S.S. Co. v. Dempsey*, [1892] 1 Q.B. 854; *Lyle Shipping Co. v. Cardiff Corporation*, [1900] 2 Q.B. 638. <sup>12</sup> *The "Jaederen"*, [1892] P. 351.

<sup>13</sup> *Wyllie v. Harrison & Co.*, 1885, 13 R. 92; *The "Alne Holme"*, [1893] P. 173; *Good & Co. v. Isaacs*, [1892] 2 Q.B. 555; *Hulthen v. Stewart*, [1903] A.C. 389.

<sup>14</sup> *Ford v. Cotesworth*, 1868, L.R. 4 Q.B. 127; *Hick v. Raymond & Reid*, [1893] A.C. 22; *Carlton S.S. Co. v. Castle Mail Packets Co.*, [1898] A.C. 486, see per Lord Herschell at p. 490.

<sup>15</sup> *Hick v. Raymond & Reid*, *supra*; *Rickinson, Sons & Co. v. Scottish Co-operative Wholesale Soc.*, 1918 S.C. 440.

not circumstances affecting the disposal of the cargo are to be taken into account.<sup>1</sup>

186. The charterer's obligation is held to be performed notwithstanding protracted delay, provided the delay is due to circumstances beyond his control, and he has not acted negligently or unreasonably.<sup>2</sup> The custom of the port is just one of the circumstances under which the work is done, and the charterer is not liable for delay which is caused by that custom.<sup>3</sup> Where the ship was to be unloaded "as fast as steamer can deliver, any custom of the port to the contrary notwithstanding," the opinion was expressed that this was not a provision for lay days, and that the charterer's obligation was simply to unload in a reasonable time,<sup>4</sup> but *quære* if the custom of the port is to be taken into account, and, if it is not, *quære* how a reasonable time is to be calculated. The charterer is liable for any delay which is due to his breach of contract. His obligation to supply a cargo is absolute.<sup>5</sup> If he neglects or delays to fulfil that obligation, he is liable for any detention which is thereby caused to the ship.<sup>6</sup>

187. Sometimes the charter-party provides for demurrage days, although no lay days are specified. In that case the demurrage days begin to run on the expiration of a reasonable time for loading or unloading as the case may be.

#### SUBSECTION (4).—*Demurrage and the Cesser Clause.*

188. By the "cesser clause" or "lien and exemption clause" in the charter-party, it is usual to extend the shipowner's common-law lien over cargo for freight, so as to cover also "dead freight and demurrage," while, in consideration of this remedy the charterer's liability is made to cease from the shipment of the cargo. Where the cesser clause is unambiguous, it applies according to its terms, even if the effect be to leave the shipowner without a remedy in respect of the breaches of contract to which the clause applies.<sup>7</sup> Where the cesser clause is not unambiguous, the extent of the lien and of the exemption depends upon the construction of the contract between the parties, and is to be gathered from the document as a whole.<sup>8</sup>

<sup>1</sup> *Dampskibsselskabet Svendborg v. Love & Stewart*, 1915 S.C. 543.

<sup>2</sup> *Hick v. Raymond & Reid*, [1893] A.C. 22, per Lord Watson.

<sup>3</sup> See *Wyllie v. Harrison*, *supra*; *Castlegate S.S. Co. v. Dempsey*, *supra*; *The "Alne Holme"*, *supra*; *Lyle Shipping Co. v. Cardiff Corporation*, *supra*; *Van Liewen v. Hollis*, [1920] A.C. 239.

<sup>4</sup> *Crown S.S. Co. v. Leitch*, 1908 S.C. 506, per Lord Low; 15 S.L.T. 811.

<sup>5</sup> *Postlethwaite v. Freeland*, 1880, 5 App. Ca. 599, per Lord Blackburn; *Ardan S.S. Co. v. Weir & Co.*, 1905, 7 F. (H.L.) 126; cp. *Little v. Stevenson*, 1896, 23 R. (H.L.) 12; and see *Krog & Co. v. Burns & Lindemann*, 1903, 5 F. 1189.

<sup>6</sup> *Gardiner v. Macfarlane, McCrindell & Co.*, 1893, 20 R. 414; *Ardan S.S. Co. v. Weir*, *supra*; cp. *Jones v. Green*, [1904] 2 K.B. 275.

<sup>7</sup> *Oglesby v. Yglesias*, 1858, E.B. & E. 930; *Milvain v. Perez*, 1861, 3 E. & E. 495.

<sup>8</sup> *Lockhart v. Falk*, 1875, L.R. 10 Ex. 132; *Clink v. Radford*, [1891] 1 Q.B. 625, per Bowen, L.J., at p. 631.

**189.** Three presumptions are recognised: (1) It is improbable that the shipowner has agreed to leave himself without a remedy in respect of any breach of contract, and accordingly it is presumed that the extent of the shipowner's lien is the measure of the charterer's exemption;<sup>1</sup> (2) there are commercial difficulties in the way of a lien for an unliquidated sum of damages, and accordingly there is a presumption against a lien being granted for damages for detention as distinguished from demurrage in the strict sense of the word;<sup>2</sup> (3) the cesser clause is more readily applied to breaches of contract which take place subsequent to shipment of the cargo than to breaches which take place prior to shipment, and accordingly it is more readily applied to claims in respect of detention incurred at the port of discharge than to claims in respect of detention incurred at the port of loading.<sup>3</sup> Where the charter-party stipulates for demurrage at the port of loading, the lien is held to cover demurrage incurred at that port,<sup>4</sup> and under the cesser clause the charterer is exempt from a claim for such demurrage.<sup>5</sup> *A fortiori* where the charter-party stipulates for demurrage at the port of discharge, the lien and the cesser clause apply to demurrage incurred there.

**190.** There has been greater difficulty with regard to damages for detention. Where the charter-party stipulates for demurrage at the port of discharge, but not at the port of loading, the lien does not cover damages for detention incurred at the port of loading, the cesser clause does not apply, and the charterer remains liable.<sup>6</sup> Although the charter-party stipulates for demurrage at the port of loading, damages for detention may be incurred there if the ship is detained beyond the demurrage days. But in this case also it would seem that a lien for demurrage does not cover damages for detention, that the cesser clause does not apply, and that the charterer is not exempt.<sup>7</sup> There is only one case<sup>8</sup> in which the lien and the cesser clause have been held to apply to damages for detention at the port of loading. In that case the

<sup>1</sup> *Gardiner v. Macfarlane, M'Crindell & Co.*, 1889, 16 R. 658; *Clink v. Radford*, *supra*, per Lord Esher, M.R.; *Dunlop v. Balfour*, [1892] 1 Q.B. 507; *Hansen v. Harrold*, [1894] 1 Q.B. 612; *Jennenson, Taylor & Co. v. Secretary of State for India*, [1916] 2 K.B. 702.

<sup>2</sup> *Lamb v. Kaselack, Alsen & Co.*, 1882, 9 R. 482; *Gardiner v. Macfarlane, M'Crindell & Co.*, *supra*, per Lord Rutherford Clark; see *Gray v. Carr*, 1871, L.R. 6 Q.B. 522, especially per Channell, B., at p. 543.

<sup>3</sup> *Christofferson v. Hansen*, 1872, 7 Q.B. 509, per Cockburn, C.J. and Blackburn, J.; *French v. Gerber*, 1877, 2 C.P.D. 247, per Bramwell, L.J., at p. 253, and 1 C.P.D. 737, per Brett, J., at p. 744; *Dunlop v. Balfour*, *supra*, per Wright, J.

<sup>4</sup> *Salvesen & Co. v. Guy & Co.*, 1885, 13 R. 85; *Gray v. Carr*, *supra*; *Francesco v. Massey*, 1873, L.R. 8 Ex. 101.

<sup>5</sup> *Kish v. Cory*, 1875, L.R. 10 Q.B. 553; *Francesco v. Massey*, *supra*; *Sanguinetti v. Pacific Steam Navigation Co.*, 1877, 2 Q.B.D. 238.

<sup>6</sup> *Gardiner v. Macfarlane, M'Crindell & Co.*, *supra*; *Lockhart v. Falk*, *supra*; *Clink v. Radford*, *supra*; *Dunlop v. Balfour*, *supra*.

<sup>7</sup> *Gray v. Carr*, *supra*; see *Gardiner v. Macfarlane, M'Crindell & Co.*, *supra*; *cp. Kish v. Cory*, *supra*, per Lord Coleridge, C.J. and Brett, J.; and *Sanguinetti v. Pacific Steam Navigation Co.*, *supra*, per Brett, L.J.

<sup>8</sup> *Bannister v. Breslau*, 1867, L.R. 2 C.P. 497.



charter-party contained no stipulation for demurrage either at the port of loading or at the port of discharge. The authority of the decision has been questioned.<sup>1</sup> With regard to damages for detention at the port of discharge, the law is not altogether clear. Where the charter-party stipulates for demurrage at the port of loading, the lien does not cover damages for detention at the port of discharge.<sup>2</sup> It is doubtful whether the cesser clause applies.<sup>3</sup>

SUBSECTION (5).—*Demurrage under Bill of Lading.*

**191.** Demurrage may also be payable under a bill of lading. Where, as in the case of a general ship, the bill of lading is the only document containing or proving the contract between charterer and shipowner, the holder of it receiving the goods is subject to its provisions respecting demurrage. Where the bill of lading follows on a charter-party, the provisions of the latter as to demurrage are frequently incorporated by reference in the former.<sup>4</sup> Where the bill of lading contains no such provisions, either expressly or by reference, the consignee must use reasonable diligence in taking delivery of the cargo.<sup>5</sup> And by the Bills of Lading Act, 1855,<sup>6</sup> every consignee of goods named in a bill of lading, and every indorsee, to whom the property in the goods passes, is subject to the same liabilities in respect of the goods as if the contract contained in the bill of lading had been made with himself.<sup>7</sup>

**192.** Where the bill of lading provides that the ship shall be unloaded in a fixed time, consignees whose goods have not been unloaded in the time specified are liable for the delay, and it is no defence that they were unable to get at their goods owing to the default of other consignees.<sup>8</sup> Where the charter-party stipulates for fixed lay days and a fixed rate of demurrage, and those conditions are incorporated in more than one bill of lading, it is doubtful whether the shipowner can recover the whole demurrage from each holder of a bill of lading.<sup>9</sup> It seems to be unreasonable that the shipowner should be entitled to claim twice over, but it is difficult to reach any other result on the terms of the bill of lading.<sup>10</sup>

<sup>1</sup> See *Gray v. Carr*, 1871, L.R. 6 Q.B. 522, per Brett, J., at p. 536; *Clink v. Radford*, [1891] 1 Q.B. 625, per Lord Esher, M.R., at p. 629.

<sup>2</sup> *Lamb v. Kaselack, Alsen & Co.*, 1882, 9 R. 482; see *French v. Gerber*, 1877, 2 C.P.D. 247, per Baggallay, L.J., at p. 252, and *cp.* per Mellish, L.J., at p. 251.

<sup>3</sup> *Cp. French v. Gerber, supra*, with *Hansen v. Harrold*, [1894] 1 Q.B. 612; see Scrutton, *Charter-Parties*, 12th ed., pp. 178 *et seq.*, where the cases are collected and examined, and *Carver, Carriage by Sea*, s. 648.

<sup>4</sup> *Gullischen v. Stewart*, 1884, 13 Q.B.D. 317.

<sup>5</sup> *Fowler v. Knoop*, 1878, 4 Q.B.D. 299.

<sup>6</sup> 18 & 19 Vict. c. 111.

<sup>7</sup> *Ibid.*, s. 1.

<sup>8</sup> *Porteus v. Watney*, 1878, 3 Q.B.D. 534; see *Straker v. Kidd*, 1878, 3 Q.B.D. 223; and *Leer v. Yates*, 1811, 3 Taunt. 387; *cp. Rogers v. Hunter*, 1827, Mood & M. 63, and *Dobson v. Droop*, 1830, Mood & M. 441; but see *Readhead v. Roessler*, 1914, 1 S.L.T. 281.

<sup>9</sup> See *Porteus v. Watney, supra*, per Brett, L.J. and Thesiger, L.J., and *Leer v. Yates, supra*, per Mansfield, C.J.

<sup>10</sup> On demurrage generally, see Abbott, *Merchant Shipping*, 14th ed., p. 370.



## SECTION 7.—SEAWORTHINESS.

SUBSECTION (1).—*Meaning of Term.*

**193.** It is the first duty of the owners and master of a ship, under every contract relating to its employment, to provide a seaworthy vessel. By the term seaworthy it is "meant that the ship shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured."<sup>1</sup> It is a relative term, varying according to the nature of the use to which the ship is put. "There is no positive condition of the vessel recognised by the law to satisfy the warranty of seaworthiness."<sup>2</sup> "The question whether a vessel is seaworthy," said Blackburn, J., "is from its nature one that in practice must almost always be determined by a jury on the evidence, with only a general direction from the presiding judge; and consequently we find in the reported cases only general definitions of seaworthiness, not rendered precise by being made referable to particular facts."<sup>3</sup> The principal circumstances relevant to the determination of this question are: the position in which the vessel is placed;<sup>4</sup> the projected voyage, its probable duration and nature, as affected among other things by the time of year at which it is made;<sup>5</sup> the age<sup>6</sup> or structure of the particular vessel with reference to which the contract was made;<sup>7</sup> the nature of the cargo to be carried;<sup>8</sup> and the manner in which it is stowed.<sup>9</sup>

**194.** The word "seaworthy" includes the manning of the ship with a competent master and an adequate crew; and also having on board such provisions as may be required.<sup>10</sup> When a statutory obligation is laid upon the owners and master of a ship with the view of providing for the safety of the vessel and crew, *e.g.* that certain officers must hold certificates from the Board of Trade, failure to comply with such obligation will be considered as constituting unseaworthiness to the prejudice of any person privy to the illegal act.<sup>11</sup> Unseaworthiness has been held established by proof of ignorance on the part of the master

<sup>1</sup> Per Parke, B., in *Dixon v. Sadler*, 1841, 5 M. & W. 405 at p. 414; see Carver on Carriage by Sea, s. 18.

<sup>2</sup> Per Watson, B., in *Knill v. Hooper*, 1857, 26 L.J. Ex. 377 at p. 379.

<sup>3</sup> *Burges v. Wickham*, 1863, 33 L.J. Q.B. 17 at p. 25.

<sup>4</sup> Arnould, *Marine Insurance*, 11th ed., s. 687; *Burges v. Wickham*, *supra*, per Cockburn, C.J., at 23; *The "Undaunted"*, 1886, 11 P.D. 46 (case of a tug undertaking towing services).

<sup>5</sup> *Daniels v. Harris*, 1874, L.R. 10 C.P. 1; *Steel & Craig v. State Line S.S. Co.*, 1877, 3 App. Ca. 72; 4 R. (H.L.) 103.

<sup>6</sup> *Watson v. Clark*, 1813, 1 Dow, 336.

<sup>7</sup> *Burges v. Wickham*, *supra*; *The Standard Oil Co. v. Clan Line Steamers*, 1924 S.C. (H.L.) 1.

<sup>8</sup> *Stanton v. Austin*, 1872, L.R. 7 C.P. 421; 1874, L.R. 9 C.P. 390; *Tattersall v. National S.S. Co.*, 1884, 12 Q.B.D. 297.

<sup>9</sup> *Daniels v. Harris*, 1874, L.R. 10 C.P. 1; *Kopitoff v. Wilson*, 1876, 1 Q.B.D. 377; *Steel & Craig v. State Line S.S. Co.*, *supra*; *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, [1924] A.C. 522.

<sup>10</sup> *Clifford v. Hunter*, 1827, 3 C. & P. 16; *The "Gunford" Ship Co. v. Thames and Mersey Marine Insur. Co.*, 1911 S.C. (H.L.) 84.

<sup>11</sup> *Cunard v. Hyde*, 1858, 27 L.J. Q.B. 408; 1859, 29 L.J. Q.B. 6; *Wilson v. Rankin*, 1865, 34 L.J. Q.B. 62.

of a series of instructions for loading, applicable to his special type of vessel, which had been issued by the builders to the owners but which had not been communicated by them to the master.<sup>1</sup>

195. The seaworthiness required in each case is that degree of seaworthiness suitable to the position of the ship, or the voyage or stage of the voyage upon which it is entering.<sup>2</sup> "By seaworthiness," said L. C. Cairns, "I do not desire to point to any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind and laden in that way may be fairly expected to encounter in crossing the Atlantic."<sup>3</sup> "Seaworthiness is well understood to mean that measure of fitness which the particular voyage or the particular stage of the voyage requires. A vessel seaworthy for port, and even for loading in port, may be, without any breach of the warranty whilst in port, unseaworthy for the voyage."<sup>4</sup> "There is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases for some definite well-recognised and distinctly separate stage of the voyage."<sup>5</sup> "As the ship may be insured to lie in port, to navigate rivers, or to sail the ocean, seaworthiness . . . is necessarily a relative term capable of a meaning suitable to whichever of these intentions may be expressed in the policy. A different state of the hull, rigging, and stores, a different state of the crew, is signified by the term as it becomes applicable to a contemplated difference of circumstances affecting the ship."<sup>6</sup> The doctrine of stages does not apply to each separate voyage made under a time charter. In such charters the warranty is satisfied if the ship be seaworthy at the commencement of the period of hiring.<sup>7</sup>

196. If a vessel be chartered for the purpose of carrying cargo of a specified nature, it must be reasonably fit to carry any reasonable cargo offered in terms of the charter;<sup>8</sup> the term "seaworthy," in the circumstances, being used not in any abstract sense, but with special reference to the particular contract. Thus a ship chartered to convey cattle was held to be unseaworthy in respect it had not been cleansed since carrying another cargo of cattle, some of which had suffered from foot-and-mouth disease.<sup>9</sup> Failure to provide a sufficient number of cattlemen for a ship carrying cattle is a breach of the warranty of sea-

<sup>1</sup> *The Standard Oil Co. v. Clan Line Steamers*, 1924 S.C. (H.L.) 1.

<sup>2</sup> *Dixon v. Sadler*, 1839, 5 M. & W. 405; *Quebec Marine Insurance Co. v. Commercial Bank of Canada*, 1870, L.R. 3 P.C. 234.

<sup>3</sup> *Steel & Craig v. State Line S.S. Co.*, 1877, 3 App. Ca. 72, at 77; 4 R. (H.L.) 103.

<sup>4</sup> Per Field, J., delivering the judgment of the Court in *Cohn v. Davidson*, 1877, 2 Q.B.D. 455, at 461.

<sup>5</sup> *Quebec Marine Insurance Co. v. Commercial Bank of Canada*, 1870, L.R. 3 P.C. 234, per Lord Penzance, at 241; Arnould, *Marine Insurance*, 11th ed., s. 699.

<sup>6</sup> Arnould, 7, 8.

<sup>7</sup> *Gierlsen v. Turnbull*, 1908 S.C. 1101.

<sup>8</sup> *Stanton v. Austin*, 1872, L.R. 7 C.P. 651; 1874, L.R. 9 C.P. 390; *Tattersall v. National S.S. Co.*, 1884, 12 Q.B.D. 297.

<sup>9</sup> *Tattersall v. National S.S. Co.*, *supra*.

worthiness.<sup>1</sup> An agreement made by bill of lading, headed "Refrigerator Bill," to carry frozen meat from Australia to this country, was held to have an implied term that the ship would be fitted with a proper refrigerator in good condition at the beginning of the voyage, and the fact that the refrigerator was not then in good condition was held to constitute unseaworthiness.<sup>2</sup>

**197.** It is sometimes difficult to determine in a particular case whether damage is attributable to unseaworthiness in respect of the unfitness of the ship to receive the cargo or merely to bad stowage.<sup>3</sup> Bad stowage itself may amount to unseaworthiness in cases where its effect is to endanger the safety of the ship.<sup>4</sup> "A ship, before setting out on the voyage, is seaworthy if it is fit in the degree which a prudent owner, uninsured, would require to meet the perils of the service it is then engaged in, and would continue so during the voyage unless it meet with extraordinary damage.<sup>5</sup> Perils which the ship must be fit to encounter without damage to the cargo have been extended to cover fumigation under the local law of a port of call where such law was known to the shipowner at the time of loading.<sup>6</sup> The question whether stowing cargo on deck makes a ship unseaworthy depends on whether the effect of such stowage is to render the ship unsafe on an ordinary voyage at that time of year. If it is a danger to the ship on an ordinary voyage, or if, in order to save the ship from ordinary perils, it is contemplated that there may be a destruction of the cargo, the vessel is rendered unseaworthy and the condition is not fulfilled.<sup>7</sup>

**198.** Unseaworthiness may be caused by a defective hull,<sup>8</sup> or a defect in the propelling power,<sup>9</sup> such as machinery,<sup>10</sup> and sails,<sup>11</sup> or insufficient coal,<sup>12</sup> by her equipment being insufficient,<sup>13</sup> *e.g.* if she have not proper anchors.<sup>14</sup> But the want of such articles as towing ropes will not constitute unseaworthiness if there is no evidence that they are required.<sup>15</sup> If there is a duty on the master to have a pilot on board, the failure to take such a precaution will constitute unseaworthiness.<sup>16</sup>

<sup>1</sup> *Sleigh v. Tyser*, [1900] 2 Q.B. 333.

<sup>2</sup> "*Maori King*" v. *Hughes*, [1895] 2 Q.B. 550; *Lund v. Thames and Mersey Insur. Co.*, 1901, 17 T.L.R. 566.

<sup>3</sup> *The "Thorsa"*, [1916] P. 257; *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, [1924] A.C. 522.

<sup>4</sup> *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, *supra*, per Lord Sumner at p. 561.

<sup>5</sup> *Gibson v. Small*, 1853, 4 H.L.C. 353, per Earle, J., at 384.

<sup>6</sup> *Ciampa v. British India Steam Navigation Co.*, [1915] 2 K.B. 774.

<sup>7</sup> *Daniels v. Harris*, 1874, L.R. 10 C.P. 1.

<sup>8</sup> *Watt v. Morris*, 1813, 1 Dow, 32; *Douglas v. Scougall*, 1816, 4 Dow, 269.

<sup>9</sup> *Seville Sulphur, etc., Co. v. Colvils, Lowden & Co.*, 1888, 15 R. 616; *cp. Cunningham v. Colvils, Lowden & Co.*, 1888, 16 R. 295.

<sup>10</sup> *The "Glenfruin"*, 1885, 10 P.D. 103.

<sup>11</sup> *Cook v. The Greenock Marine Insur. Co.*, 1843, 5 D. 1379.

<sup>12</sup> *The "Undaunted"*, 1886, 11 P.D. 46; *Thin v. Richards*, [1892] 2 Q.B. 141; *Park v. Duncan & Son*, 1898, 25 R. 528.

<sup>13</sup> "*Maori King*" v. *Hughes*, *supra* (refrigerator).

<sup>14</sup> *Wilkie v. Geddes*, 1815, 3 Dow, 57.

<sup>15</sup> *Stone v. Aberdeen Marine Insurance Co.*, 1849, 11 D. 1041.

<sup>16</sup> Carver on Carriage by Sea, s. 18.



SUBSECTION (2).—*Time to which Warranty applies.*

**199.** The time at which the obligation is laid upon the owners and master to provide a vessel tight, staunch, and strong, with all necessary equipment, is, according to circumstances, the commencement of loading or the setting sail upon her voyage, or at the moment when the risk attaches.<sup>1</sup> If a ship is seaworthy at that time, it does not matter how soon thereafter she becomes unseaworthy, the obligation is fulfilled; but if she shew herself to be unseaworthy soon after sailing, the presumption may be that she was unseaworthy at the commencement.<sup>2</sup> But this does not depend on any question of time alone: it is an inference from facts. Of course the longer the time which elapses between setting sail and shewing inability to proceed, the less strong will be the inference; but the matter of time is only one element for consideration, and not by any means the most important.<sup>3</sup> A ship may, however, start from port in such a condition that it would be reckoned to have been unseaworthy if it were allowed to remain so during the voyage, e.g. a port may have been left unfastened,<sup>4</sup> or a hatchway open, or a pipe may have been left uncased which ought to have been cased,<sup>5</sup> or a sea cock not properly closed.<sup>6</sup> But it will not thereby be rendered unseaworthy, provided that can easily be remedied after starting, and before the defect can cause injury. Such a case was *Cunningham v. Colvils, Lowden & Co.*,<sup>7</sup> where the ship started with muddy water in the boiler, which could have been blown off when she got out to sea. But if the defect cannot be remedied without removing the cargo, the condition is held not to have been complied with.<sup>8</sup>

SUBSECTION (3).—*Statutory Provisions.*

**200.** By the Merchant Shipping Act, 1894,<sup>9</sup> it is declared a misdemeanour for any person to send or attempt to send a British ship to sea in such an unseaworthy state that the life of any person is likely to be thereby endangered. But it is a defence to prove either that the person charged used all reasonable means to ensure her being sent in a seaworthy state, or that her going in an unseaworthy state was, in the circumstances, reasonable and justifiable. The Board of Trade has

<sup>1</sup> Carver, 7th ed., s. 21. (For contracts to which the Carriage of Goods by Sea Act, 1924, applies, see Art. III. 1 thereof.)

<sup>2</sup> *Watson v. Clark*, 1813, 1 Dow, 336; *Parker v. Potts*, 1815, 3 Dow, 23, at p. 31; *Klein v. Lindsay*, 1911 S.C. (H.L.) 9.

<sup>3</sup> *Pickup v. Thames Insurance Co.*, 1878, 3 Q.B.D. 594.

<sup>4</sup> *Steel & Craig v. State Line S.S. Co.*, 1877, 3 App. Ca. 72; 4 R. (H.L.) 103; *Dobell v. S.S. Rossmore Co.*, [1895] 2 Q.B. 408.

<sup>5</sup> *Gilroy, Sons & Co. v. Price & Co.*, 1892, 20 R. (H.L.) 1; [1893] A.C. 56.

<sup>6</sup> *The "Schwan"*, [1909] A.C. 450.

<sup>7</sup> 1888, 16 R. 295; cp. *Seville Sulphur, etc., Co. v. Colvils, Lowden & Co.*, 1888, 15 R. 616.

<sup>8</sup> *Steel & Craig v. State Line S.S. Co.*, *supra*; *Gilroy, Sons & Co. v. Price & Co.*, *supra*; cf. *The "Schwan"*, *supra*.

<sup>9</sup> 57 & 58 Vict. c. 60, s. 457.



power to detain any British ship which is unsafe by reason of the defective condition of her hull, equipment, or machinery, or by reason of undermanning or overloading or improper loading.<sup>1</sup> When a foreign ship has taken on board any part of her cargo at a port in the United Kingdom, she may similarly be detained on the ground of safety by reason of overloading, improper loading, or undermanning.<sup>2</sup>

**201.** The owner of a British sea-going ship is exempted from liability for loss of or damage to goods by fire, and for the loss of or damage to gold, silver, and other enumerated articles of value, the true nature and value of which have not been declared in writing by the shipper to the owner or master of the ship, where such loss and damage happens without the owner's actual fault or privity;<sup>3</sup> and this exemption protects the shipowner, even although there has been a breach by him of the warranty of seaworthiness, unless the operation of the section is excluded by express contract between parties.<sup>4</sup>

#### SUBSECTION (4).—*With Whom may Questions arise?*

**202.** Questions as to the seaworthiness of a ship may arise with (1) members of the crew, (2) charterers or cargo-owners, or (3) insurers of ship, goods, freight, or salvage.

##### (i) *The Crew.*

**203.** In every contract of service between the owner of a ship and the shipmaster or one of the crew, and in every instrument of apprenticeship to sea, there is implied an obligation on the owner that he, and every agent employed by him in preparing the ship for sea, or sending her to sea, shall use all reasonable means to ensure her seaworthiness at the commencement, and keep her so during the voyage. This obligation towards every master or seaman cannot be waived; but it may be pleaded that the sending the ship to sea in an unseaworthy state was reasonable and justifiable.<sup>5</sup> But a ship is not held unseaworthy at the commencement of the voyage if she leave port with something undone which requires to be done to make her seaworthy, provided the defect can easily be remedied before any danger arise therefrom (see *supra*). And it is not a breach of the owner's obligation to use all reasonable means to keep the ship seaworthy, that owing to neglect on the part of the master the defect has not been timeously rectified.<sup>6</sup> It is a defence to a charge of desertion or absence without leave, that a certain number of the crew allege that the ship is by reason of unseaworthiness not in a fit condition to proceed to sea.<sup>7</sup>

<sup>1</sup> M.S.A., 1894, ss. 459–461; M.S.A., 1897, 60 & 61 Vict. c. 59, s. 1 (1).

<sup>2</sup> M.S.A., 1894, s. 462; M.S.A., 1897, s. 1 (2).

<sup>3</sup> M.S.A., 1894, s. 582.

<sup>4</sup> *Virginia Carolina Chemical Co. v. Norfolk and North American S.S. Co.*, [1912] 1 K.B.

229. <sup>5</sup> M.S.A., 1894, s. 458.

<sup>6</sup> *Hedley v. Pinkney & Sons S.S. Co.*, [1894] A.C. 222.

<sup>7</sup> M.S.A., 1894, s. 463.

(ii) *Charterers and Cargo-owners.*

**204.** In every contract for the carriage of goods, except where the Carriage of Goods by Sea Act, 1924, applies, there is implied an undertaking on the part of the carrier that the vessel shall be seaworthy.<sup>1</sup> The undertaking of seaworthiness means not merely that the person providing the ship will do his best to make the ship fit, but warrants that the ship will really be fit.<sup>2</sup> In contracts, however, to which the Carriage of Goods Act, 1924, applies, this absolute undertaking is abolished and there is substituted for it a statutory obligation to exercise due diligence to make the ship seaworthy.<sup>3</sup> The warranty is that the vessel will be seaworthy for loading purposes at the time of loading,<sup>4</sup> and for the voyage at the time of commencing the voyage.<sup>5</sup> If there are several stages in the voyage, she must be seaworthy at the time of starting on each stage.<sup>6</sup> And in particular the warranty of seaworthiness on sailing *from* the port of loading will be implied although there is an express warranty in the charter relating only to the time of sailing *for* that port.<sup>7</sup> In time charters, however, the implied warranty is satisfied if the ship is seaworthy at the commencement of hiring; thereafter the shipowner's duty is to defray the expenses of repairs, etc. needed to maintain the condition of the ship.<sup>8</sup> Although the ship may be seaworthy at the commencement of the voyage, she may afterwards become unseaworthy. In that event it is the duty of the master, if he has opportunity, to have the defect repaired.<sup>9</sup>

**205.** The warranty of seaworthiness in a contract of carriage is only of importance in so far as it affects the obligation to carry safely. If the goods are carried without injury, it is of no account that the vessel was unseaworthy on sailing, and only accomplished the voyage owing to fortunate circumstances. On the other hand, if a cargo suffers damage, to render the shipowner liable it must be established both that the ship was unseaworthy and that the damage would not have arisen but for that unseaworthiness.<sup>10</sup> The burden of proving

<sup>1</sup> *Kopitoff v. Wilson*, 1876, 1 Q.B.D. 377.

<sup>2</sup> *Steel & Craig v. State Line S.S. Co.*, 1877, 3 App. Ca. 72, per Lord Blackburn, at 86; 4 R. (H.L.) 103; *Douglas v. Scougall*, 1816, 4 Dow, 269; *The "Glenfruin,"* 1885, 10 P.D. 103.

<sup>3</sup> See *infra*, para. 220.

<sup>4</sup> *Stanton v. Austin*, 1872, L.R. 7 C.P. 651; 1874, L.R. 9 C.P. 390.

<sup>5</sup> *Cohn v. Davidson*, 1877, 2 Q.B.D. 455; "*Maori King*" *v. Hughes*, [1895] 2 Q.B. 550; *Park v. Duncan & Son*, 1898, 25 R. 528; *New York and Cuba S.S. Co. v. Eriksen*, 1922, 27 Com. Ca. 330.

<sup>6</sup> *Thin v. Richards*, [1892] 2 Q.B. 141; *Quebec Marine Insurance Co. v. Commercial Bank of Canada*, 1870, L.R. 3 P.C. 234.

<sup>7</sup> *Seville Sulphur, etc., Co. v. Colvils, Lowden & Co.*, 1888, 15 R. 616; *Cunningham v. Colvils, Lowden & Co.*, 1888, 16 R. 295, per Lord Shand at p. 314.

<sup>8</sup> *Giertsen v. Turnbull*, 1908 S.C. 1101; but distinguish *The "Vortigern,"* [1899] P. 140, and *Park v. Duncan*, 1898, 25 R. 528; and see Carver, 7th ed., s. 144.

<sup>9</sup> *Worms v. Story*, 1855, L.J. Ex. 1; *Thin v. Richards*, [1892] 2 Q.B. 141.

<sup>10</sup> *Cunningham v. Colvils, Lowden & Co.*, 1888, 16 R. 295 at p. 311; *The "Europa,"* [1908] P. 84; *Kish v. Taylor*, [1912] A.C. 604.

unseaworthiness lies on the party asserting it, but in cases where a ship becomes unseaworthy soon after leaving port, that fact alone may set up a presumption of initial unseaworthiness, thus shifting the onus.<sup>1</sup> Where unseaworthiness causing damage has been proved, but the damage has been increased by a cause for which the shipowner is not liable under the contract, the shipowner will be liable for the whole damage if unseaworthiness was in fact the dominant cause.<sup>2</sup>

206. It is competent to parties to the contract to limit the liability of the carrier, but a clear expression of intention is necessary to exempt him from this implied warranty.<sup>3</sup> If the obligation to provide a seaworthy vessel is discharged provided the owner uses all reasonable means to make the ship seaworthy, this constitutes an obligation that the owner, through his agents, will use such reasonable means, and negligence on the part of one of the crew causing unseaworthiness will make the owner liable. The effect of such a limitation is to exempt the owner from liability for latent defects.<sup>4</sup> An exception which exempts the owner from liability for accidents or perils of the sea, or for fault, negligence, or error in navigation, or in the management of the vessel, has no reference to the seaworthiness of the vessel at the time of sailing.<sup>5</sup> It will not relieve the owner from liability where negligence on the part of the master or crew has caused unseaworthiness at the beginning of the voyage; and if a peril of the sea cause damage which would not have been caused but for the unseaworthiness of the ship at the time of sailing, the exception will not benefit him.<sup>6</sup> Notice that the carrier will not be liable for any damage unless it should happen from want of care or diligence on the part of the master or crew, in which case his liability is stated to be at a certain rate, will only limit his responsibility where the law would make him answer to the full for the neglect of others, and leave him liable as before for loss occasioned through his own neglect in not providing a seaworthy vessel.<sup>7</sup> Exceptions which have for their object the exemption of owners from liability for unseaworthiness are effectual to the extent they state when they provide that the ship shall be seaworthy only so far as ordinary care can make her; or as far as due care in the selection of agents, pilots, master, and

<sup>1</sup> *Klein v. Lindsay*, 1911 S.C. (H.L.) 9, per Lord Shaw at p. 14.

<sup>2</sup> *The "Christel Vinnen,"* [1924] P. 208.

<sup>3</sup> Carver on Carriage by Sea, s. 102a; Scrutton, 12th ed., pp. 249, 272; and see *Rathbone v. MacIver*, [1903] 2 K.B. 378; *Elderslie Steamship Co. v. Borthwick*, [1905] A.C. 93; *Nelson Line v. Nelson*, [1908] A.C. 16; *Steel & Craig v. State Line S.S. Co.*, 1877, 4 R. (H.L.) 103.

<sup>4</sup> *Dobell & Co. v. S.S. "Rossmore,"* [1895] 2 Q.B. 408; and see *Cargo ex "Laertes,"* 1887, 12 P.D. 187.

<sup>5</sup> *Dobell & Co. v. S.S. "Rossmore,"* *supra*; *"Maori King" v. Hughes*, [1895] 2 Q.B. 550; *Park v. Duncan & Son*, 1898, 25 R. 528; *Gilroy, Sons & Co. v. Price & Co.*, 1892, 20 R. (H.L.) 1; [1893] A.C. 56; *The "Glenfruin,"* 1885, 10 P.D. 103; see Scrutton, 12th ed., 276.

<sup>6</sup> *Steel & Craig v. State Line S.S. Co.*, 1877, 3 App. Ca. 72; 4 R. (H.L.) 103; *The "Christel Vinnen,"* [1924] P. 208.

<sup>7</sup> *Lyon v. Mells*, 1804, 5 East, 428; 17 R.R. 726; *Tattersall v. National S.S. Co.*, 1884, 12 Q.B.D. 297.



crew can ensure it; or that the owners shall not be liable for damage arising from latent defect in the machinery.<sup>1</sup>

207. If the ship provided for a cargo is not seaworthy, the cargo-owner may refuse to put his cargo on board.<sup>2</sup>

(iii) *Insurers.*

208. "There is nothing," said Lord Eldon, "in matters of insurance of more importance than the implied warranty that a ship is seaworthy when she sails on the voyage insured."<sup>3</sup> This warranty, the extent of which is the same as in a question with the owner of cargo, is implied in every marine insurance policy, whether on the ship,<sup>4</sup> freight,<sup>5</sup> cargo,<sup>6</sup> or salvage,<sup>7</sup> with the exception of a time policy. The warranty is dealt with by s. 39 of the Marine Insurance Act, 1906.<sup>8</sup> There is no warranty of seaworthiness implied in any time policy, although such a condition may be inserted therein.<sup>9</sup> But under a time policy if the ship is sent to sea with the privity of the assured in an unseaworthy condition, the insurer is not liable for any loss attributable to unseaworthiness.<sup>10</sup> It is not necessary to disclose anything to the underwriters as to the seaworthiness of the vessel, since that is an implied warranty.<sup>11</sup> It is a condition precedent to the contract, and if it is not complied with it does not matter whether any loss was caused by unseaworthiness or not, the underwriters escape liability.<sup>12</sup>

209. The ship must, in order that the warranty may be complied with, be seaworthy at the time when the risk begins.<sup>13</sup> If she is so, the policy attaches, and the insured cannot afterwards claim return of the premium on the ground that, owing to subsequent unseaworthiness, the risk was never run.<sup>14</sup> Where the policy attaches while the ship is in port, there is an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.<sup>15</sup> If the policy be on a ship "at and from" a port, the policy attaches if, while at the port, she is seaworthy for the port. But when she sails, she must also be seaworthy for the voyage. This is implied in the contract. If a ship is insured "at and from" a port, and while

<sup>1</sup> *Cargo ex "Laertes,"* 1887, 12 P.D. 187.

<sup>2</sup> *Stanton v. Austin*, 1872, L.R. 7 C.P. 651; 1874, L.R. 9 C.P. 390.

<sup>3</sup> *Douglas v. Scougall*, 1816, 4 Dow, 269, at 276.

<sup>4</sup> *Watson v. Clark*, 1813, 1 Dow, 336.

<sup>5</sup> *Pickup v. Thames Insur. Co.*, 1878, 3 Q.B.D. 594.

<sup>6</sup> *Daniels v. Harris*, 1874, L.R. 10 C.P. 1.

<sup>7</sup> *Knill v. Hooper*, 1857, 26 L.J. Ex. 377.

<sup>8</sup> 6 Edw. VII. c. 41; and see Arnould on Marine Insurance, 11th ed., c. iv.

<sup>9</sup> *Gibson v. Small*, 1853, 4 H.L.C. 353; *Dudgeon v. Pembroke*, 1877, L.R. 2 App. (C).  
284; *Kenneth & Co. v. Moore*, 1883, 10 R. 547.

<sup>10</sup> Marine Insurance Act, 1906, s. 39 (5).

<sup>11</sup> *Baker & Adams v. Scottish Sea Insurance Co.*, 1856, 18 D. 691.

<sup>12</sup> *Cook v. Greenock Marine Insurance Co.*, 1843, 5 D. 1379.

<sup>13</sup> *Redman v. Wilson*, 1845, 14 M. & W. 476.

<sup>14</sup> Arnould on Marine Insurance, 11th ed., s. 691.

<sup>15</sup> Marine Insurance Act, 1906, s. 36 (2).



"at" the port is seaworthy for the purposes of the port, but not for the voyage, and thereafter starts on her voyage without being rendered seaworthy for it, the warranty is not fulfilled.<sup>1</sup> Where the policy relates to a voyage to be performed in stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.<sup>2</sup> It is enough to attach the policy that the ship be seaworthy for the current or commencing stage. The seaworthiness of the ship at the commencement of the voyage is presumed;<sup>3</sup> but if she become unseaworthy, shortly after sailing, without any apparent cause, the presumption will be altered, and the onus thrown on the owners of proving her seaworthiness at starting.<sup>4</sup>

210. If the warranty is not complied with, the insured has no action on the policy, and it is no answer to a defence of unseaworthiness to say that the defect was remedied after sailing and before the occurrence of the loss.<sup>5</sup> It is of course competent for parties to the contract to dispense with the warranty either before or after the breach, or to limit it in any manner they may please, or for the underwriters to admit the seaworthiness.<sup>5</sup> But any exception in this respect must be stated in very express and clear terms.

211. The defence of unseaworthiness to an action on the policy must be stated specifically in order to entitle the defender to a proof of it.<sup>6</sup>

## PART II.—THE HARTER ACT, ACTS OF THE BRITISH DOMINIONS, AND THE CARRIAGE OF GOODS BY SEA ACT, 1924.

### SECTION 1.—THE HARTER ACT.

212. In recent years the freedom of contract between shipowners and those whose goods they carry has been restricted by legislation in various countries. In the United States the freedom of contract was, even before such legislation, held to be subject to certain restrictions which are unknown to our law. Thus a clause exempting the shipowner from liability for the negligence of himself or his servants was held to be contrary to public policy and therefore unenforceable.<sup>7</sup> These

<sup>1</sup> *Parker v. Potts*, 1815, 3 Dow, 23; *Quebec Marine Insurance Co. v. Commercial Bank of Canada*, 1870, L.R. 3 P.C. 234.

<sup>2</sup> *Marine Insurance Act*, 1906, s. 39 (3).

<sup>3</sup> *Watson v. Clark*, 1813, 1 Dow, 336; *Parker v. Potts*, *supra*; *Pickup v. Thames Insurance Co.*, 1878, 3 Q.B.D. 594.

<sup>4</sup> *Pickup v. Thames Insurance Co.*, *supra*; see *Ajum Goolam Hossen & Co. v. Union Marine Co.*, [1901] A.C. 362; *Klein v. Lindsay*, 1911 S.C. (H.L.) 9.

<sup>5</sup> *Quebec Marine Insurance Co. v. Commercial Bank of Canada*, *supra*.

<sup>6</sup> *Baker v. Scottish Sea Insurance Co.*, 1855, 17 D. 417.

<sup>7</sup> *The "Montana"*, 1889, 129 U.S. Rep. 397; *The "Guildhall"*, 1893, 58 Fed. Rep. 796; *Botany Worsted Mills v. Knott*, 1897, 82 Fed. Rep. 471.

common-law restrictions on freedom of contract in the United States do not receive effect in our Courts. But in 1893 an Act of Congress, known as the Harter Act, was passed, and by ss. 2 and 5 of the Act a British shipowner issuing a bill of lading in the United States is bound to incorporate its provisions. It results that the limits of the Harter Act are incorporated as part of the contract, and effect is given to them in our Courts, not as matter of statute, but as part of the agreement between the parties.<sup>1</sup>

**213.** Sec. 1 of the Harter Act forbids the insertion into any bill of lading or shipping document of a clause relieving the ship of liability for loss arising from negligence, fault or failure in proper loading, stowage, custody, care, or proper delivery. For a discussion of the terms of this section see the cases undernoted.<sup>2</sup> This section does not apply to transportation of live animals (s. 8).

**214.** By s. 2 it is made unlawful to insert in any bill of lading or shipping document an agreement by which the obligations of the owner to exercise due diligence to properly equip, man, provision, and outfit the vessel and to make her seaworthy, or whereby the obligation of the master and others to carefully handle and stow cargo and to care for and properly deliver the same shall be in any way lessened, weakened, or avoided.

**215.** By s. 3 it is provided that if the owner of any vessel transporting merchandise to or from any port in the United States of America shall use due diligence to make the vessel seaworthy,<sup>3</sup> the owner shall not be liable for loss resulting from errors in navigation or management. The effect of this section is not to take away the absolute warranty of seaworthiness, but merely to give immunity in certain specified cases if due diligence to make the ship seaworthy has been used.<sup>4</sup> The shipowner must shew that due diligence has been exercised not only by himself but by those whom he employs.<sup>5</sup> The terms "navigation" and "management" have given rise to many disputes.<sup>6</sup>

## SECTION 2.—ACTS OF THE BRITISH DOMINIONS.

**216.** The Harter Act has been copied or imitated in the Australian Sea Carriage of Goods Act, 1904, now repealed by the Sea Carriage of

<sup>1</sup> *In re Missouri S.S. Co.*, 1888, 42 Ch. D. 321; *Dobell v. S.S. "Rossmore,"* [1895] 2 Q.B.D. 412, 413.

<sup>2</sup> *Dobell v. S.S. "Rossmore,"* [1895] 2 K.B. 408; *The "Glenochil,"* [1896] P. 10; *The "Rodney,"* [1900] P. 112; *Ronson v. Atlantic Transport Co.* [1903] 2 K.B. 666.

<sup>3</sup> *Moore v. Lunn*, 1923, 39 T.L.R. 526; *Standard Oil Co. v. Clan Line*, 1924 S.C. (H.L.) 1.

<sup>4</sup> *M'Fadden v. Blue Star Line*, [1905] 1 K.B. 697; *The "Carib Prince,"* 1898, 170 U.S. Rep. 635.

<sup>5</sup> *Dobell v. S.S. "Rossmore,"* [1895] 2 Q.B. 408.

<sup>6</sup> *The "Ferro,"* [1893] P. 38; *The "Southgate,"* [1893] P. 329; *The "Glenochil,"* [1896] P. 10; *The "Rodney,"* [1900] P. 112; *Ronson v. Atlantic Transport Co.*, [1903] 2 K.B. 666; *The "Renée Hyafil,"* 1916, 32 T.L.R., 660; *Owners of S.S. "Lord" v. Newsum*, [1920] 1 K.B. 846; *Toyosaki Kissen Kaisha v. Affrèleurs Réunis*, 1922, 27 Com. Ca. 157; see Scrutton, 12th ed., pp. 276 *et seq.* (For the Act generally, see Scrutton, App. 516; Carver, ss. 103a-103f, 373b, 698.)

Goods Act, 1924,<sup>1</sup> and in the Canadian Water Carriage of Goods Act, 1910,<sup>2</sup> and by certain New Zealand statutes.<sup>3</sup>

### SECTION 3.—THE CARRIAGE OF GOODS BY SEA ACT, 1924.

**217.** The Carriage of Goods by Sea Act, 1924,<sup>4</sup> is the legislative result of the recommendation of the International Law Association (the Hague, September 1921), the Diplomatic Conference on Maritime Law held at Brussels in October 1922, and the Imperial Economic Conference of November 1923. The Australian Sea Carriage of Goods Act, 1924, is framed on lines similar to that of the British Act, but so far the other Dominions have not given legislative effect to the recommendation of the Imperial Economic Conference. The British Act took effect from the 1st January 1925, and at the date when this article was written it had not been the subject of judicial consideration. The difficulties with which the Act bristles are discussed at length in Scrutton on Charter-Parties and Bills of Lading.<sup>5</sup> It will, however, be convenient to refer here to the scope and general effect of the Act.

**218.** The Act introduces certain statutory rules into all bills of lading issued in this country in connection with goods (as defined in Article I. (c)) to be carried from any port in Great Britain or Northern Ireland. The statutory definition of goods excludes live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried. By these rules the liabilities of carriers are fixed and irreducible (Articles II. and III.). On the other hand, the rights of carriers under the Act may be given up or modified by the express terms of a clause introduced by agreement into the bill of lading (Articles IV. and V.). The rules do not apply to charter-parties, but if bills of lading are issued in the case of a ship under a charter-party they shall comply with the terms of the rules (Article V., see also Article I. (b)).<sup>6</sup>

**219.** The rules do not apply to goods carried in the coasting trade from any port in Great Britain or Northern Ireland to any other port in Great Britain, Northern Ireland or the Irish Free State, provided that no bill of lading is issued and that the terms agreed for carriage are embodied in a receipt which is a non-negotiable document marked as such (s. 4 and Article VI.). The rules do not apply when any particular goods are carried, not under a bill of lading, but under terms embodied in a receipt which is not negotiable and marked as such, provided that the shipment is not an ordinary commercial shipment (Article VI.).

**220.** When the Act does apply, then from the moment the goods

<sup>1</sup> See Scrutton, pp. 529, 530.

<sup>2</sup> See Scrutton, p. 521 *et seq.*

<sup>3</sup> See Scrutton, p. 526 *et seq.*; Carver, App. E.

<sup>4</sup> 14 & 15 Geo. V. c. 22.

<sup>5</sup> 12th ed., App. iv.

<sup>6</sup> See also Carver, s. 151; Scrutton, p. 488 *et seq.*



are loaded till they are discharged (Article I. (e) and Article VII.) the responsibilities and liabilities of the shipowner are irreducibly fixed (Articles II. and III. 8). The absolute warranty of seaworthiness is abolished (s. 2), a matter wherein the Act contrasts with the Harter Act.<sup>1</sup> But the carrier is bound to exercise due diligence to make the ship seaworthy, to properly man, equip, and supply her, and to make all parts of the ship in which goods are to be carried fit for their reception, carriage, and preservation (Article III. 1 (a)). He shall also properly and carefully load, handle, stow, carry, keep, and care for and discharge the goods (Article III. 2).

**221.** After receiving the goods the carrier or his master or agent shall, on demand of the shipper, issue a bill of lading shewing the marks necessary for identification, the number of packages or the quantity and weight as furnished by the shipper and the apparent order and condition of the goods (Article III. 3).<sup>2</sup> The bill of lading so issued shall be *prima facie* evidence of the receipt of the goods therein described (Article III. 4). The shipper shall be deemed to guarantee the accuracy of the marks, number, quantity, and weight as furnished by him (Article III. 5). But no carrier is bound to state marks, number, quantity or weight, the accuracy of which he has reasonable ground for suspecting, or which he has had no reasonable means of checking.<sup>3</sup>

**222.** Unless notice of loss is given in writing at the port of discharge before removal of the goods, or, if the loss be not apparent, within three days after removal, such removal shall be *prima facie* evidence of delivery of the goods as described in the bill of lading (Article III. 6). And in any case the carrier shall be discharged of all liability for loss and damage unless suit is brought within one year after delivery (Article III. 6).

**223.** The rights and immunities of the carrier are set out in Article IV. These, however, may be modified by agreement (Article V.). It is provided that the carrier shall not be liable for loss or damage arising from unseaworthiness unless there has been a want of the due diligence required under Article III. 1. But where loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier (Article IV. 1). There is also a series of exemptions (Article IV. 2) which need not be particularly referred to here, except to call attention to the first exemption of the series which is from loss resulting from the act, neglect, or default of the master, mariners, pilot, or servant in the navigation or management of the ship (Article IV. 2 (a));<sup>4</sup> and to the concluding exemption for loss or damage arising from any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier unless this exemption falls to

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<sup>1</sup> Para. 214, *supra*.

<sup>2</sup> Special provision is made for bulk cargoes by s. 5.

<sup>3</sup> Proviso to Article III. 3.

<sup>4</sup> And see para. 215, *supra*.



be construed as *ejusdem generis* with those which precede it, all the intermediate exemptions in the same paragraph of Article IV. are redundant and otiose. It is, however, difficult to find a genus in which all these exemptions could be included. The burden of proof shall be on the person claiming the benefit of the exemption to shew that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage (Article IV. 2 (g)).<sup>1</sup>

224. There is a peculiar provision excusing the carrier for loss or damage arising out of deviation. It provides, *inter alia*, that any reasonable deviation shall not be deemed to be a breach of the contract of carriage (Article IV. 4). The meaning of this article is very obscure, since deviation is simply a breach of the contract, and apparently the Courts will have to decide what is a reasonable breach of contract (Article IV. 4).<sup>2</sup> There are also provisions restricting liability to £100 per unit, unless value has been declared (Article IV. 5), and giving the carrier power to land, destroy, or render innocuous dangerous goods. (Article IV. 6).

### PART III.—CARRIAGE OF PASSENGERS.

#### SECTION 1.—THE CONTRACT.<sup>3</sup>

225. Apart from statutory provisions, the relations of a passenger to the owner or charterer upon whose ship he is being carried depend upon the terms of the contract between them. In the absence of special agreement, the liability of public carriers of passengers is not identical with that of common carriers of goods in that the former do not fall under the edict *nautæ, caupones, stabularii*, and are not treated as insurers of the safety of the passengers. The responsibility of carriers of passengers is to use due care, including skill and foresight, to carry their passengers in safety. The degree of care demanded is a high one, and all reasonable vigilance must be exercised to see that whatever is required for the safe conveyance of passengers is in fit and proper order.<sup>5</sup> Thus in regard to seaworthiness the carrier's duty is not absolute, but is to provide a ship as seaworthy as care and skill can make it.<sup>5</sup>

226. Carriers of passengers who publicly hold themselves out as

<sup>1</sup> For the effect of this, see *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, [1915] A.C. 705; *Standard Oil Co. v. Clan Line Steamers*, 1924 S.C. (H.L.) 1.

<sup>2</sup> Scrutton, p. 502.

<sup>3</sup> Cf. *Carriage by Land*, s. 4; Bell, Prin. ss. 170, 405 and note (a).

<sup>4</sup> *Readhead v. Midland Rly.*, 1869, L.R. 4 Q.B. 379. As regards duty towards stowaways, see *Grand Trunk Rly. of Canada v. Barnett*, [1911] A.C. 369.

<sup>5</sup> *Hyman v. Nye*, 1881, 6 Q.B.D. 685; *Anderson v. Pyper & Co.*, 1820, 2 Mur. 261; *Lyon v. Lamb*, 1838, 16 S. 1188. By s. 457 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), it is made a misdemeanour to send a ship to sea in such an unseaworthy state that life is likely thereby to be endangered.

such are probably bound to receive and carry all who are willing to contract with them,<sup>1</sup> provided there is room on the ship and the prospective passenger is a fit person to be carried and not one whose presence would be likely injuriously to affect the crew or other passengers. A carrier would not be justified in refusing to receive a passenger merely on the ground that his presence would be distasteful to others on board,<sup>2</sup> or that he was a person of notoriously bad character.<sup>3</sup> The master of a home trade passenger steamer has statutory power to refuse to receive a person who is drunk or who behaves in such a way as to cause annoyance or injury to passengers on board.<sup>3</sup>

227. A passenger is not entitled to require the ship to leave at the advertised or agreed-on time unless by the terms of his contract there is a warranty given by the carrier to this effect. It is sufficient to free the carrier from liability that the voyage was begun in reasonable time<sup>4</sup> and prosecuted without undue delay.<sup>5</sup>

228. A carrier may by inserting conditions in the contract (*e.g.* by printing on tickets) relieve himself, in whole or in part, from liability for loss, injury or damage to the passenger or his luggage. But in order to make such conditions effectual to displace the common-law right of the passenger to be carried with due care it must be shewn either that the conditions were brought to the notice of the passenger, or that the carrier did what was reasonably sufficient to bring them to the passenger's notice. It is a question depending on the circumstances of each case whether the conditions relieving the carrier from liability form part of the contract or not.<sup>6</sup>

## SECTION 2.—LIABILITY FOR INJURY TO PASSENGERS.

229. For injury to passengers arising from the fault of the owners or their servants on board the owners are answerable. If injury is due to the negligence of another ship the owners thereof are liable, and that notwithstanding the contributory negligence of the passenger's vessel.<sup>7</sup> If both vessels have by negligence contributed to the accident they are jointly and severally liable for loss of life or personal injury.<sup>8</sup> Where loss of life or personal injury has occurred without the actual fault or privity<sup>9</sup> of the owners there are provisions of the Merchant

<sup>1</sup> *Henderson v. Stevenson*, 1875, 2 R. (H.L.) 71, at p. 77.

<sup>2</sup> See *Abbott*, Merchant Shipping, 14th ed., 888; *Coppin v. Braithwaite*, 1844, 8 Jur. 875.

<sup>3</sup> M.S.A., 1894, s. 288.

<sup>4</sup> *Crane v. Tyne Shipping Co.*, 1897, 13 T.L.R. 172.

<sup>5</sup> Cf. *Le Blanche v. L. and N.W. Ry. Co.*, 1876, 1 C.P.D. 286.

<sup>6</sup> *Parker v. S.E. Ry. Co.*, 1877, 1 C.P.D. 618; *Richardson v. Rowntree*, [1894] A.C. 217; *Williamson v. North of Scotland Navigation Co.*, 1916 S.C. 554; *Hood v. Anchor Line, Ltd.*, 1916 S.C. 547, 1918 S.C. (H.L.) 143; *Lewis v. Laird Line, Ltd.*, 1925 S.L.T. 316 (O.H.); *Morris v. Clan Line*, 1925 S.L.T. 321 (O.H.).

<sup>7</sup> *The "Bernina"*, 1887, 12 P.D. 58; 1888, 13 App. Ca. 1; *Adams v. Glasgow and S.W. Ry. Co.*, 1875, 3 R. 215.

<sup>8</sup> Maritime Conventions Act, 1911 (1 & 2 Geo. V. c. 57.), s. 2.

<sup>9</sup> *Standard Oil Co. v. Clan Line Steamers*, 1924 S.C. (H.L.) 1.

Shipping Acts under which they may limit the extent of their liability, and reference is made thereto.<sup>1</sup>

### SECTION 3.—PASSENGERS' LUGGAGE.

**230.** In the absence of special agreement, the obligation of a carrier by sea towards the personal luggage of passengers is that of a common carrier under the edict. But where the luggage is kept under the personal control of the passenger, and the damage to such luggage is contributed to by him, the carrier is not liable.<sup>2</sup>

### SECTION 4.—THE MASTER'S AUTHORITY.

**231.** For the safety of the ship and the well-being and comfort of all on board the law places unfettered authority in the hands of the master, and it is the duty of all on board to obey him.<sup>3</sup> In regard to passengers this power must, at the master's peril, be restricted to the necessity of the case.<sup>4</sup> Under circumstances of common danger the master may require passengers to assist in working the ship or in fighting an enemy.<sup>5</sup> For extraordinary assistance to the ship in distress a passenger may be entitled to remuneration, in the nature of salvage, for his services.<sup>6</sup> There are a series of statutory powers conferred on the master for regulating the conduct of passengers,<sup>7</sup> under which he may, *inter alia*, require a passenger to leave the ship at any convenient port in the United Kingdom for drunkenness or disorderly conduct and certain other offences.

### SECTION 5.—STATUTORY PROVISIONS.

#### SUBSECTION (1).—Definitions.

**232.** Part III. of the Merchant Shipping Act, 1894,<sup>8</sup> as amended by Part II. of the Merchant Shipping Act, 1906,<sup>9</sup> regulates the conveyance of passengers by sea and imposes many statutory duties upon owners and masters engaged in this traffic. The expression "passenger steamer" means every British steamship (except steam ferry-boats working in chains) carrying passengers to, from, or between any places in the United Kingdom and every foreign steamship (whether originally

<sup>1</sup> M.S.A., 1894, ss. 502, 503; M.S.A., 1906, s. 69; MacLachlan on Merchant Shipping, 6th ed., ch. 3; and see M'Millan, Scottish Maritime Practice, ch. 11.

<sup>2</sup> For this subject, see Carriage by Land, s. 5, p. 22, *supra*.

<sup>3</sup> *Boyce v. Bayliffe*, 1808, 1 Camp. 58; *Prendergast v. Compton*, 1838, 8 C. & P. 454.

<sup>4</sup> *Aldworth v. Stewart*, 1866, 4 F. & F. 957; *Boyce v. Bayliffe*, *supra*.

<sup>5</sup> *Boyce v. Bayliffe*, *supra*.

<sup>6</sup> *Newman v. Walters*, 1804, 3 B. & P. 612.

<sup>7</sup> M.S.A., 1894, s. 287; *Lundie v. MacBrayne*, 1894, 21 R. 1085. For the enforcing of sanitary regulations by the master, see M.S.A., 1894, ss. 324–5.

<sup>8</sup> 57 & 58 Vict. c. 60.

<sup>9</sup> 6 Edw. VII. c. 48.



proceeding from a port in the United Kingdom or not) which carries passengers to, from, or between any places in the United Kingdom.<sup>1</sup> The statutes deal with (1) passenger ships which are not emigrant ships, and (2) passenger ships which are also emigrant ships. "Emigrant ship" means every sea-going ship, whether British or foreign, carrying upon any voyage to which the provisions of Part III. of the Act (1894) respecting emigrant ships apply, more than fifty steerage passengers or a greater number of steerage passengers than in the proportion of one statute adult<sup>2</sup> to thirty-three tons of the ship's registered tonnage in the case of a sailing ship, or to twenty tons in the case of a steamship.<sup>3</sup> Steerage passengers are defined as all passengers except cabin passengers, and no one is deemed a cabin passenger unless (a) the space allotted to his exclusive use is in the proportion of at least thirty-six clear superficial feet to each statute adult, and (b) the fare contracted to be paid by him amounts to at least £25 for the entire voyage, or is in the proportion of at least sixty-five shillings for every thousand miles of the voyage, and (c) he has been furnished with a duly signed contract ticket in the form prescribed by the Board of Trade.<sup>4</sup>

#### SUBSECTION (2).—*Passenger Ships.*

**233.** Every passenger ship must, if she carries more than twelve passengers,<sup>5</sup> be surveyed at least once a year, and may not go to sea with any passengers on board unless the owner or master has the certificate of survey from the Board of Trade, and she may be detained if she attempts to do so until the certificate is produced to the proper officer of customs.<sup>6</sup> Penalties are imposed on summary conviction for non-compliance with this provision.<sup>7</sup> The formalities required to obtain a certificate are set out in the Acts.<sup>8</sup> The survey must declare that the hull and machinery of the vessel are in good condition, and sufficient for the intended services, and the time, if less than one year, for which the equipment and machinery will be sufficient, and the limits beyond which the steamer is not fit to ply; that the boats, life-buoys, lights, signals, compasses, deck-shelters, safety-valves, and fire-hose are in accordance with the requirements of the Act; the limit of weight to be put on safety-valves;<sup>9</sup> the number of passengers which she is fit to carry; and that the certificates of the master, mates, and engineers are such as the Act requires.<sup>10</sup> The Act then provides for exhibition of the certificate of survey<sup>11</sup> and specifies the requirements for the adjusting of compasses, the fitting of fire-hose, the construction of safety-valves, the provision of deck-shelters<sup>12</sup> and the equipment of the ship with

<sup>1</sup> M.S.A., 1894, s. 267; M.S.A., 1906, s. 13; *Yeudall v. Sweeney*, 1922, J.C. 32.

<sup>2</sup> M.S.A., 1894, s. 268 (2).

<sup>3</sup> *Ibid.*, s. 268 (1).

<sup>4</sup> M.S.A., 1906, s. 14.

<sup>5</sup> *Yeudall v. Sweeney*, 1922, J.C. 32.

<sup>6</sup> M.S.A., 1894, s. 271.

<sup>7</sup> M.S.A., 1906, s. 21.

<sup>8</sup> M.S.A., 1894, ss. 272–277.

<sup>9</sup> See *ibid.*, s. 286, for enforcement of this.

<sup>10</sup> *Ibid.*, s. 272.

<sup>11</sup> *Ibid.*, s. 281.

<sup>12</sup> *Ibid.*, s. 285.



distress signals.<sup>1</sup> No passenger ship may carry passengers on more than one deck below the water line,<sup>2</sup> or more passengers than the number specified in the certificate.<sup>3</sup>

### SUBSECTION (3).—*Emigrant Ships.*

**234.** An emigrant ship cannot proceed to sea unless she has a passenger steamer's certificate or has been specially surveyed.<sup>4</sup> She must possess certain equipment additional to that required for a passenger steamer.<sup>5</sup> There must be sufficient provisions and water on board to insure the daily issue required by the dietary contained in the 12th Schedule of the Act.<sup>6</sup> Medicine<sup>7</sup> and, in certain circumstances, a medical practitioner must be carried.<sup>8</sup> A minimum scale for the employment of stewards, cooks, and interpreters is imposed.<sup>9</sup> Before sailing, the emigration officer must be satisfied as to the efficiency of the crew<sup>10</sup> and the health of all on board.<sup>11</sup> The master must also have delivered a list of the passengers in duplicate to the emigration officer<sup>12</sup> and received back one of the lists countersigned. Notice of any additional passengers must thereafter be given and a fresh clearance certificate obtained.<sup>13</sup> The clearance certificate requires to state that all terms of the Act have been complied with,<sup>14</sup> and the master must enter into a bond in the sum of £2000 to the Crown.<sup>15</sup> There are numerous other provisions for emigrant ships contained in the Acts, and reference is made thereto.

**235.** As affecting the safety of passengers, reference is made to the Merchant Shipping (Convention) Act, 1914,<sup>16</sup> and to the Merchant Shipping (Wireless Telegraphy) Act, 1919.<sup>17</sup> To provide against the deception of prospective passengers by passage-brokers and emigrant-runners there are provisions as to licenses, etc., for persons engaged in these occupations.<sup>18</sup> Further, a person receiving money from any person for a passage as a steerage passenger in any ship, or as a cabin passenger in any emigrant ship, on certain voyages, must give in return a ticket, in a form approved by the Board of Trade, and signed by or on behalf of the owners or master of the ship.<sup>19</sup>

<sup>1</sup> M.S.A., 1894, s. 435.

<sup>2</sup> M.S.A., 1906, s. 16.

<sup>3</sup> M.S.A., 1894, s. 283; *ibid.*, 1906, s. 22.

<sup>4</sup> M.S.A., 1894, s. 289. <sup>5</sup> *Ibid.*, s. 290.

<sup>6</sup> *Ibid.*, ss. 295, 298; and note M.S.A., 1906, ss. 17, 18.

<sup>7</sup> M.S.A., 1894, s. 300. <sup>8</sup> *Ibid.*, s. 303.

<sup>9</sup> *Ibid.*, s. 304.

<sup>10</sup> *Ibid.*, s. 305. <sup>11</sup> *Ibid.*, s. 306.

<sup>12</sup> *Ibid.*, s. 311.

<sup>14</sup> M.S.A., 1894, s. 314.

<sup>13</sup> *Ibid.*, 312 (4); M.S.A., 1906, s. 76.

<sup>15</sup> *Ibid.*, s. 309; M.S.A., 1906, s. 20.

<sup>16</sup> 4 & 5 Geo. V. c. 50. Part II. of this Act deals with the manning, construction, and equipment of passenger ships, but the Act does not come into operation until 1st Jan. 1927 (Stat. R. and O., 1925, No. 1263).

<sup>17</sup> 9 & 10 Geo. V. c. 38.

<sup>18</sup> M.S.A., 1894, ss. 341–354; M.S.A., 1906, ss. 23, 24.

<sup>19</sup> M.S.A., 1894, s. 320. As to "form," see *Ryan v. Oceanic Steam Navigation Co.*, [1914] 3 K.B. 731. The money need not be received for a specified passage in a named ship (*Hart v. Hunter*, 1906, 8 F. (J.) 34).

CARTEL.  
CARTEL SHIP.

*See* INTERNATIONAL LAW.

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CASUAL HOMICIDE.

*See* CRIME.

## CASUALTIES OF SUPERIORITY.

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## SECTION 1.—HISTORICAL.

SUBSECTION (1).—*General.*

**236.** Feudal law in Scotland recognised eight casualties of superiority in addition to the statutory fine known as composition. These eight casualties were Disclamation, Purpresture, Ward, Marriage, Recognition, Non-Entry, Liferent-Escheat, and Relief. Disclamation and purpresture fell into desuetude at an early stage in the history of Scots law; ward, recognition, and marriage were abolished in 1747 by 20 Geo. II. c. 50; non-entry was expressly abolished by the Conveyancing (Scotland) Act, 1874; and the only casualties now remaining in force are liferent-escheat, relief, and composition. Ward, recognition, and marriage were casualties peculiar to ward-holdings, the old Scottish military tenure under which a vassal held his land in return for certain military services. Ward and marriage, however, could be imported into feu-farm holdings by express stipulation in the deeds constituting the feudal grant. The other casualties were common to all Scottish tenures except burgage.<sup>1</sup>

<sup>1</sup> Ersk. ii. 5, 5, *et seq.*

SUBSECTION (2).—*Disclamation and Purpresture.*

**237.** Disclamation was a casualty involving the total forfeiture of the vassal's feu to the superior if the vassal disowned or disclaimed his superior. To entitle a superior to demand the lands as forfeited to him, it was necessary that there should be, on the vassal's part, a judicial disclaimer of the superior's right, or some other unequivocal act, such as the taking of sasine by the vassal from someone not the true superior.<sup>1</sup> Purpresture or purpursion also involved the total forfeiture of the feu to the superior; it was a penalty incurred by the vassal's encroachment on the heritable property belonging to the King or other superior.<sup>2</sup>

SUBSECTION (3).—*Ward.*

**238.** In the tenure of ward, a superior was entitled to have in possession of the feu a vassal who was fit to render him the customary military services; and if the vassal in the lands happened to be under age, the superior was entitled to possession of the estate so long as the vassal remained unfit to render these services. Accordingly, when a vassal in a ward-holding died leaving an heir not of full age, the superior had a right to the casualty of ward, in virtue of which he had the right to enter on the lands and to draw the profits of the ward-fee until the majority of the heir, if male, or until the vassal, if female, reached marriageable age, which was held to be fourteen. The right was an implied condition in the charter, and a superior was entitled to the casualty without having to take any formal legal proceedings. The superior, while in possession, was entitled to a liferenter's use of wasting subjects, such as minerals and timber, but his right was burdened with the aliment of the minor heir, so far as the latter had no means sufficient to support him in a position suitable to his station in life. The casualty covered all the lands contained in the grant made to the vassal by his superior, even those which he had sub-feued to others without the express consent of the superior.

**239.** When lands were held ward of several superiors, each enjoyed the casualty of ward from his respective grant. The estate might in certain circumstances be subject to "black ward," *i.e.* a vassal might be subject to the casualty of ward at the instance of a subject-superior, and the subject-superior, being in minority, might at the same time be liable to the casualty of ward at the instance of his superior. In that case the sub-vassal might lose the rents of his lands, not only during his own minority, but also during the minority of his immediate superior.

**240.** The amount due in respect of the casualty might be fixed in the feudal grant at a definite sum, in which case the casualty was called "taxed ward." Where the casualty was taxed, the minor was entitled to remain in possession of his ancestor's estates, and the superior's right was limited to the sum specified in the charter. The superior in such

<sup>1</sup> Ersk. ii. 5, 51.<sup>2</sup> *Ibid.*, 5, 52.



circumstances was free from the obligation to aliment the heir or to maintain the estate.<sup>1</sup>

#### SUBSECTION (4).—*Marriage.*

**241.** The tenure of ward originally entitled the superior, during the minority of his vassal, not only to the ward of his estates, but also to the guardianship of his person. As guardian, he was entitled to find a suitable husband or wife for the heir, and in consequence of this right the superior claimed as his due the marriage portion which the heir might have received on marriage. In practice, the casualty of marriage was an exaction of a sum of money from the ward-vassal in every case where the heir was not married at the time of his ancestor's death, whether the vassal was major or minor, and whether or not he was required by the superior to marry.<sup>2</sup> The sum payable to the superior was called the "avail." The "avail" was fixed by the Court of Session in 1674 as being three years' free rent, and it was subsequently modified to two years' rent of the ward's whole estate, whether in part held by other tenures or not. The amount was not the precise tocher which the vassal got by his wife, but the sum to which his estate might reasonably have been supposed to entitle him.<sup>3</sup> If the vassal not only refused to marry a bride chosen for him by the superior, but married another against the wishes of the superior, he became liable to "double avail," which, in practice, was not more than three years' rent. The superior's right to double avail was, however, guarded by many stringent conditions.<sup>4</sup> The casualty might be taxed at a fixed sum. When a vassal held ward-fees of more than one superior, he was liable in the casualty of marriage only to the senior superior, that is, to the superior from whom the vassal's ancestors in blood had received the first grant by the tenure of ward.<sup>5</sup>

#### SUBSECTION (5).—*Recognition.*

**242.** This casualty involved the total forfeiture of the feu to the superior by a vassal in a ward-fee if he sold and "annailed all and hail his lands with their pertinents or the maist part thereof without license, consent, or confirmation of his overlord."<sup>6</sup> According to the later Scottish feudal law, a vassal was entitled to alienate one-half of his fee, but if he exceeded the half, he forfeited not only the part sold, but the whole of his ward lands held of that superior. This penalty, however, was only incurred if the alienation was voluntary, if it was to a stranger, and if it was made without the consent of the superior. Alienations taking place by force of law, such as apprisings or adjudications following on the debts of the vassal, did not lead to forfeiture of the lands to the superior.<sup>7</sup> In considering whether there had been an alienation to

<sup>1</sup> Ersk. ii. 5, 5-9.

<sup>2</sup> *Ibid.*, 5, 19.

<sup>3</sup> *Gibson v. Ramsay*, 1673, Mor. 8534.

<sup>4</sup> Bell's Dict. *voce* "Disparagement."

<sup>5</sup> Ersk. ii. 5, 18-21.

<sup>6</sup> Bell's Dict. *voce* "Recognition."

<sup>7</sup> Ersk. ii. 5, 12.

a stranger, it was held that all were strangers to the vassal except those who, if they had survived the vassal, would have necessarily succeeded to him.<sup>1</sup>

#### SUBSECTION (6).—*Non-Entry.*

**243.** Under the old feudal law, a grant made to a vassal by a superior was for life; on the death of the vassal, his heir had no right to claim the fee, and the superior was entitled to resume possession of the lands.<sup>2</sup> When, in the development of feudalism, feus became hereditary, the heir was entitled to claim the lands held by his ancestor, but only on condition of applying to the superior for a renewal of the investiture in his own person, with a tender of the customary dues of entry. If he failed to do so, the superior was entitled to enter into possession of the lands. The casualty of non-entry was this right to resume possession of the feu on the last-entered vassal's death, and the right to retain possession, so long as the heir did not obtain an entry. At a later stage in the history of feudal law, the heir was left in possession after his ancestor's death, and the superior's right became a claim to have an entered vassal in the feu. This right he could only enforce after making a formal demand that the heir should enter and pay the dues of a renewal of the investiture. The superior's right was enforced by an action of declarator of non-entry, in which it was sought to have it declared that the lands had fallen into non-entry; and when decree was granted, the superior was entitled to the casualty of non-entry, that is, to enter on the feu and enjoy the fruits so long as the lands were not held by an entered vassal. In virtue of this casualty, the superior was entitled to the rents of the feu since the date of death of the last-entered vassal.<sup>3</sup> By s. 4 (4) of the Conveyancing (Scotland) Act, 1874, no lands are now to be deemed in non-entry, but the superior may, under feu-rights granted prior to the passing of that Act, enforce, on the death of the last-entered vassal, the payment of relief or composition from the vassal in possession by a statutory action which preserves for him what is in substance the casualty of non-entry.

#### SUBSECTION (7).—*Relief.*

**244.** Relief is the sum payable to the superior by the heir of the last vassal who died entered in the feu, in return for the superior's acceptance of him as a vassal. In feus from which the casualty is exigible it amounts to one year's feu-duty, and in blench holdings, to one year's blench-duty, in either case in addition to the feu- or blench-duty of the year. It is called "relief" because, by making this payment, the heir relieves or recovers the fee from the superior's hands, into which it had fallen on the death of the last-entered vassal.<sup>4</sup> Relief was originally exigible only from ward-holdings unless express stipulation was made

<sup>1</sup> Ersk. ii. 5, 16.

<sup>3</sup> Ersk. ii. 5, 29 *et seq.*

<sup>2</sup> *Ibid.*, ii. 5, 29; Bell, Prin. s. 706.

<sup>4</sup> *Ibid.*, ii. 5, 47–8; *Stirling v. Ewart*, 1842, 4 D. 684.

in the feu-rights for payment.<sup>1</sup> The transference of the casualty to feu-farm tenure was facilitated by the statutory conversion of ward-holdings into feu-farm tenure.

#### SUBSECTION (8).—*Composition.*

**245.** According to the early feudal law, a vassal had no power, without the superior's consent, to substitute for himself a stranger as vassal in the lands. Prior to 1469 there was no method, direct or indirect, by which a singular successor could compel a superior to receive him as vassal. By the Act of 1469, c. 36, however, superiors were ordained to receive apprisers upon payment by them of a year's maill or rent of the lands, as these were set for the time. The object of this statute was merely to give an apprising creditor effectual means of making his security available for his debt. By a series of statutes (1669, c. 18; 1672, c. 19; 1681, c. 17) this privilege was extended to adjudgers for debt, and to purchasers of lands at judicial sales. These enactments were used by singular successors as a means of forcing the superior to grant them an entry to lands acquired by them. A fictitious bond was, as a rule, granted by the seller to the purchaser or other singular successor, and he adjudged the lands in implement of the bond. On payment of a year's rent as composition, the singular successor was then entitled to an entry from the superior. By the Act 20 Geo. II. c. 50, the right to obtain an entry was extended to all singular successors, on payment to the superior of "such fees or casualties as he is by law entitled to receive." These "fees or casualties" are "a year's maill of the lands as the same are set for the time," that is to say, the statutory payment provided for in the Act of 1469.<sup>2</sup>

**246.** Composition is, strictly speaking, a statutory fine and not a true feudal casualty.<sup>3</sup> It is included in the definition of "casualties" given in the Conveyancing (Scotland) Act, 1874, and in the Feudal Casualties (Scotland) Act, 1914, but the question has arisen in a number of cases as to the true nature of the payment. A renunciation of "casualties of superiority" in a deed of 1701 was thought not to include composition,<sup>4</sup> but the contrary has been held in the interpretation of deeds of a later date.<sup>5</sup>

#### SUBSECTION (9).—*Escheat.*

**247.** Escheat, that is, forfeiture of estate, is either single or liferent. Single escheat is forfeiture to the Crown of a man's moveable estate and is part of the penalty of a capital sentence. Liferent-escheat involves the forfeiture to the superior of the annual profits of the vassal's lands

<sup>1</sup> *Earl of Dundonald v. Bar*, 1736, Mor. 13579.

<sup>2</sup> *Earl of Home v. Lord Belhaven and Stenton*, 1903, 5 F. (H.L.) 13.

<sup>3</sup> *Cockburn Ross v. Heriot's Hospital*, 6th June 1815, F.C.; 6 Pat. 640.

<sup>4</sup> *Stuart v. Jackson*, 1889, 17 R. 85.

<sup>5</sup> *Hill's Trs. v. Kay's Tutor*, 1902, 4 F. 572, and cases cited there.



during the vassal's life, or so long as he remains unrelaxed, when sentence of outlawry has been pronounced against him. The sentence must have endured for a year and a day. Prior to 1748 both single and liferent-escheat followed upon denunciation and putting to the horn for non-payment of a civil debt or non-performance of an obligation, but the Act 20 Geo. II. c. 50 abolished the casualties of single and liferent-escheat for civil debts and obligations. Where a vassal is *civiliter mortuus*, the superior, subject to the rights of the Crown, is entitled to liferent-escheat from the lands. The possession thus had by the superior does not affect the fee of the estate; it is retained by the vassal, and may be disposed of by him in any way he pleases, so long as he does not prejudice the liferent right of the superior.<sup>1</sup>

SECTION 2.—EFFECT ON CASUALTIES OF THE CONVEYANCING (SCOTLAND) ACT, 1874, AND THE FEUDAL CASUALTIES (SCOTLAND) ACT, 1914.

248. No casualties were exigible *ex lege* from feus created subsequent to the passing of the 1874 Act, and it was made illegal to stipulate in any feudal grants made subsequent to that date for any payments of the nature of casualties not fixed in amount and payable at definite and regular intervals. The express intention of the Act was, however, to leave untouched the superior's rights to casualties from feus created prior to the passing of the Act.<sup>2</sup> But notwithstanding the terms of the Act, the superior's rights have been affected in several ways. No provision was made for the recovery of non-entry duties, and these are not now recoverable, even in the case of their falling due prior to the passing of the Act.<sup>3</sup> The superior's right to casualties on consolidation was limited (s. 7), and on the other hand, the Act encroached on the vassal's power to tender the heir of the last-entered vassal in answer to a demand for composition. A new importance was also given to the taking of infektment in cases where subinfeudation is validly prohibited.

249. The Feudal Casualties (Scotland) Act, 1914,<sup>4</sup> extinguishes casualties as from, at latest, 1st January 1935 by providing for the redemption of existing casualties, and in the event of their not being redeemed within the statutory period, by making them no longer exigible. It is made illegal to stipulate in future for any recurring payment other than an annual feu-duty. The statute is to be read and construed with the 1874 Act so far as consistent with the tenor of the two Acts, and in its application the general law of casualties, with certain exceptions to be noted, still prevails.

<sup>1</sup> *M'Rae v. Hyndman*, 1839, M'L. & Rob. 645; Hume, i. 546; ii. 271, 482; Ersk. ii. 5, 53; Ross, Lect. i. 274; Bell, Prin. s. 730; Bell, Conv. i. 539, 627.

<sup>2</sup> 37 & 38 Vict. c. 94, ss. 4 (3), 7, 23, 24.

<sup>3</sup> *Lord Advocate v. Moray*, 1890, 17 R. 945.

<sup>4</sup> 4 & 5 Geo. V. c. 48.



## SECTION 3.—COMPOSITION.

SUBSECTION (1).—*Amount Exigible.*

**250.** Apart from express stipulation in the feu-rights, the amount exigible by the superior in name of composition is “a year’s mail as the lands are set for the time”<sup>1</sup> The superior is entitled to receive the equivalent of one year’s enjoyment of the feu, just as if he had entered into possession,<sup>2</sup> irrespective of whether the ground be built on or not.<sup>3</sup> If the lands are not let, but are in the vassal’s possession, the amount payable is the rent for which they may be let.<sup>4</sup> If the subjects have not a letting value in the open market, the Court will ascertain the fair annual value.<sup>5</sup> The value to be taken is the value of the lands as at the time when the demand is made. Prospective value of agricultural land, as for building, is not taken into account in estimating the year’s rent.<sup>6</sup> But the value to be taken is not necessarily the agricultural value, although the ground has been cleared of buildings. If the ground is in fact a building site, the composition is the feu-duty which may be got from it as a feuing subject.<sup>7</sup>

**251.** Minerals in the vassal’s lands must be included in estimating the amount of composition, provided they are being worked or are let.<sup>8</sup> They are not taken into account if they are neither worked nor let.<sup>9</sup> In estimating the amount of composition due from the minerals, the actual mineral rent of the year of demand is taken, whether it be a fixed rent or a royalty. It was at one time thought that, if the minerals were in course of being exhausted, the equitable method of computing the annual value was to take a percentage of the capital value. But this method has been disapproved by the House of Lords.<sup>10</sup> In estimating the compensation payable in redeeming casualties, as opposed to calculating the amount of a composition already due, the rules set forth in s. 7 of the Feudal Casualties (Scotland) Act, 1914, must be followed. If the estate comprises grass-lands<sup>11</sup> or shootings,<sup>12</sup> the rent of these, or the fair annual value if they are unlet, is included in composition. The same rule applies to salmon-fishings.

**252.** Where the lands are let, the amount of the composition is the rent. But if a vassal lets his lands and his lessee sub-lets them, the composition exigible is the amount of the rent under the lease, not that

<sup>1</sup> *Earl of Home v. Lord Belhaven and Stenton*, 1903, 5 F. (H.L.) 13.

<sup>2</sup> *Allan’s Trs. v. Duke of Hamilton*, 1878, 5 R. 510, at p. 521.

<sup>3</sup> *Aitchison v. Hopkirk*, 1775, Mor. 15060.

<sup>4</sup> *Aitchison*, *supra*; *Lord Blantyre v. Dunn*, 1858, 20 D. 1188.

<sup>5</sup> *Hill v. Caledonian Rly. Co.*, 1877, 5 R. 386; *M’Laren v. Burns*, 1886, 13 R. 580.

<sup>6</sup> *Neilston School Board v. Graham*, 1887, 15 R. 44.

<sup>7</sup> *Pollokshaws Co-operative Society, Ltd. v. Stirling-Maxwell*, 1906, 8 F. 638.

<sup>8</sup> *Earl of Home v. Lord Belhaven and Stenton*, 1903, 5 F. (H.L.) 13; *Allan’s Trs. v. Duke of Hamilton*, 1878, 5 R. 510; *Sivright v. Straiton Estate Co., Ltd.*, 1879, 6 R. 1208.

<sup>9</sup> *M’Laren v. Burns*, 1886, 13 R. 580.

<sup>10</sup> *Earl of Home*, *supra*.

<sup>11</sup> *Mags. of Inverness v. Duff*, 1771, Mor. 9300, explained in *Earl of Home*, *supra*, p. 22.

<sup>12</sup> *Stewart v. Bulloch*, 1881, 8 R. 381.

under the sub-lease.<sup>1</sup> If a lessee acquires the fee of his lands prior to a demand for payment of composition, the lease is extinguished, and the annual value, not the rent under the lease, is the measure of the casualty.<sup>2</sup> If the lands are used for special purposes which give them a special value, the amount of the casualty in each case depends on circumstances, and no general rule can be laid down. Thus, where a composition was claimed from lands comprising part of a railway, the composition was estimated at 4 per cent. on the purchase price.<sup>3</sup> As to what fixtures are to be included in estimating composition, the rule applicable to the relation of landlord and tenant, not of heir and executor, is applied. Accordingly, rent attributable to trade fixtures is not included.<sup>4</sup> Where parties differ as to the annual value, and either of them declines to be bound by the rent appearing in the Valuation Roll, proof of the true yearly value will be allowed. The statement in the Valuation Roll is not conclusive.<sup>5</sup>

**253.** Where a vassal sub-feus his lands, the composition payable by him to his superior is not a year's rent of the lands, but the sub-feu-duty. The effect of sub-feuing, whether with or without a grassum, has been recently before the Court, and the following rules may be deduced : (1) Where a sub-feu has been granted for a feu-duty without a grassum, the composition is the sub-feu-duty whether it seems adequate or not ; <sup>6</sup> (2) where a sub-feu has been granted for a sub-feu-duty and a grassum, the composition is the sub-feu-duty together with a percentage on the grassum. There is no definite rule as to the amount per cent. to be taken, but the usual rate is 5 per cent. ; <sup>7</sup> (3) where the sub-feu has been granted for an annual feu-duty, but an agreement has been entered into that it should not be exacted for a term of years, and during that term the demand is made, the composition is the feu-duty ; (4) where the feu-duty is graduated, so that it increases in a definite ratio year by year, the composition is the feu-duty payable for the year in which the casualty is demanded ; <sup>8</sup> (5) where part of the lands have been sub-feued, and part retained by the vassal, the composition is estimated by taking the rent of the part retained, and the feu-duty of the part sub-feued.<sup>9</sup>

**254.** How far sub-casualties are to be included is an open question.<sup>10</sup> In lands which have been sub-feued, it may happen that a casualty is

<sup>1</sup> *Campbell v. Stuarts*, 1884 (O.H.), 22 S.L.R. 292.

<sup>2</sup> *Lord Blantyre v. Dunn*, 1858, 20 D. 1188.

<sup>3</sup> *Hill v. Caledonian Rly. Co.*, 1877, 5 R. 386 ; *Campbell v. Ayr County Council*, 1904 (O.H.), 12 S.L.T. 160.

<sup>4</sup> *Marshall v. Tannoch Chemical Co., Ltd.*, 1886, 13 R. 1042. As to growing timber, see *Smith-Shand's Trs. v. Forbes*, 1922 S.C. 351 ; 1922, S.L.T. 369.

<sup>5</sup> *M'Laren v. Burns*, 1886, 13 R. 580 ; *Duke of Argyll v. Bullough*, 1904, 6 F. 949.

<sup>6</sup> *Governors of George Heriot's Trust v. Paton's Trs.*, 1912 S.C. 1123 ; *Mason v. Ritchie's Trs.* 1918 S.C. 466 (whole Court) ; 1918, 1 S.L.T. 351.

<sup>7</sup> *Smith-Shand's Trs. v. Forbes*, 1922 S.C. 351 ; 1922, S.L.T. 369.

<sup>8</sup> *City of Aberdeen Land Association, Ltd. v. Mags. of Aberdeen*, 1904, 6 F. 1067.

<sup>9</sup> *Anderson v. Potts*, 1824, 3 S. 334.

<sup>10</sup> *Campbell v. Westenra*, 1832, 10 S. 734 ; *Cockburn Ross v. Heriot's Hospital*, 6th June 815, F.C. ; 1820, 6 Pat. 640.

due from the sub-vassal to the vassal at the time when the superior demands a composition from the vassal. A sub-casualty, however, does not seem to be part of the year's mail; it is a payment to the superior by the vassal in return for recognition.<sup>1</sup>

#### SUBSECTION (2).—*Deductions.*

255. In estimating the "year's mail" the Court has recognised that certain deductions from the annual rent or value fall to be made in favour of the vassal. The "superior is entitled for the entry of singular successors, in all cases where such entries are not taxed, to a year's rent of the subjects, whether lands or houses, as the same are let or may be let at the time, deducting the feu-duty and all public burdens, and likewise all annual burdens imposed on the lands by consent of the superior, with all reasonable annual repairs to houses, and other perishable subjects."<sup>2</sup> The deductions which are now recognised are (a) the annual feu- or blench-duty;<sup>3</sup> (b) all public burdens; (c) annual burdens imposed on the lands with the superior's consent; (d) reasonable annual repairs on houses and other perishable subjects, the repairs being such as fall on a landlord;<sup>4</sup> (e) teind payable from the lands if the superior has right to the teinds, but if he has not, one-fifth of the teindable rental is deducted;<sup>5</sup> and (f) various deductions may be allowed in special circumstances, such as cost of a wayleave<sup>6</sup> or severance damages.<sup>4</sup>

#### SUBSECTION (3).—*When is a Casualty exigible?*

256. A casualty, apart from a contractual obligation in the feu-right, is exigible from feus granted prior to 1874 only on the death of the last vassal who entered with the superior before 1874, or who has paid a casualty since 1874. On payment of a casualty by a vassal in the lands, no further casualty is exigible until that vassal's death. The casualty then exigible is payable by the vassal in possession of the lands, and the payment is made by him for his own entry.<sup>7</sup> The superior's right to demand a casualty, however, is excluded if there is a liferenter in possession under a grant from the superior,<sup>8</sup> but the fact that there is a liferenter infeft in the lands and thereby entered in virtue of the Conveyancing (Scotland) Act, 1874, is no defence to a demand by the superior for a casualty from the fiar.<sup>9</sup> The superior's demand is postponed to the extent of one-third if a widow is in possession of the lands

<sup>1</sup> *Macgregor v. Commissioners of Inland Revenue*, 1889, 16 R. 438.

<sup>2</sup> *Aitchison v. Hopkirk*, 1775, Mor. 15060; 2 Ross L.C. 183.

<sup>3</sup> *Aitchison*, *supra*; *Hill v. Caledonian Rly. Co.*, 1877, 5 R. 386. <sup>4</sup> *Hill*, *supra*.

<sup>5</sup> *Mags. of Inverness v. Duff*, 1771, Mor. 9300; *Thomson v. Simson*, 1825, 4 S. 224; *Reid v. Fullerton*, 1825, 4 S. 226; Bell, Conv. ii. 1148; *Mason v. Ritchie's Trs.*, 1917 (O.H.), 2 S.L.T. 103.

<sup>6</sup> *Earl of Home v. Lord Belhaven and Stenton*, 1900, 2 F. 1218.

<sup>7</sup> *Mounsey v. Palmer*, 1884, 12 R. 236.

<sup>8</sup> Bell, Conv. i. 623.

<sup>9</sup> *Stuart v. Jackson*, 1889, 17 R. 85.



in virtue of terce, and to the extent of the whole if the lands are burdened with courtesy.<sup>1</sup> The superior's right, in the case of adjudications, and in the case of contractual casualties, may not depend on the death of the last-entered vassal.

SUBSECTION (4).—*A Casualty is not due until demanded.*

257. Prior to the passing of the Conveyancing (Scotland) Act, 1874, although a superior was entitled to demand payment of a casualty from the successor in the lands immediately on the death of the last-entered vassal, his right consisted merely of a claim which had to be made effectual by an action declaring that the lands had fallen into non-entry.<sup>2</sup> Only then did the casualty become a debt due by the vassal, for the superior might, if he pleased, allow one or more successors of the late vassal to lie out unentered; until the action was taken the vassal was not regarded as contumacious, and he was entitled to retain possession of the lands. When once a vassal had obtained an entry, no further casualty was due until that vassal's death. The passing of the Conveyancing Act, 1874, however, provided for the implied entry of vassals, without the intervention of the superior, and, although such entry is no defence to an action for payment of a casualty, questions have arisen as to the effect of implied entry on the vassal's liability.<sup>3</sup> It may now be taken as settled that the passing of the Act of 1874 did not alter the law that a casualty becomes a debt only when a demand for it is made. Lands are no longer in non-entry, however, and a new form of action in place of the old declarator of non-entry is provided for recovery of the casualty. Decree in that action is declared to have the effect of a decree of declarator of non-entry according to the law before 1874. Accordingly, the right of the superior to casualties exigible from feus created prior to 1874 is to make a demand for his casualty so soon as the last vassal dies, but the sum exigible is not a debt of the vassal, but a claim against him which can only be enforced by the statutory action. It must be sued for by the new remedy in place of the old, and with the same effect, namely, that until a demand is made there is no debt, and if a vassal alienates the lands before the casualty is claimed from him he is not liable.<sup>4</sup> Formal divestiture is unnecessary if *de facto* the lands have been alienated prior to the date of demand.<sup>5</sup> The rule has been held to apply to the entry of a corporation under s. 5 of the 1874 Act.<sup>6</sup> Contractual casualties are subject to different rules.

<sup>1</sup> Bell, Prin. s. 710.

<sup>2</sup> Ersk. ii. 5, 29.

<sup>3</sup> *Leith Heritages Co. v. Edinburgh and Leith Glass Co.*, 1876, 3 R. 789; *Straiton Estate Co., Ltd. v. Stephens*, 1880, 8 R. 299; *Sivright v. Straiton Estate Co.*, 1879, 6 R. 1208; *Stewart v. Murdoch*, 1882, 19 S.L.R. 649.

<sup>4</sup> *Mounsey v. Palmer*, 1884, 12 R. 236; *Motherwell v. Manwell*, 1903, 5 F. 619; *Fisher's Exrx. v. Fisher's Trs.*, 1903, 6 F. 196.

<sup>5</sup> *City of Aberdeen Land Association v. Mags. of Aberdeen*, 1904, 6 F. 1067.

<sup>6</sup> *Governors of Heriot's Trust v. Caledonian Insurance Co.*, 1904, 6 F. 442.



SUBSECTION (5).—*Rent of what Year to be taken.*

258. Prior to 1874, the year's rent to be paid by a singular successor was the rent of the lands at the time when the new charter was granted; that is to say, the rent of the year in which the vassal demanded an entry, or in which the superior insisted on the vassal entering.<sup>1</sup> The logical inference from recent decisions seems to be that the amount of composition is still the rent of the year either in which the vassal demands an entry by tendering the casualty, or in which the superior demands the casualty.<sup>2</sup> The principles laid down in the case of *Motherwell v. Manwell*<sup>3</sup> seem to shew that implied entry is not to be taken as affecting in any way the superior's claim, that the law regulating a vassal's liability is still as it was prior to the passing of the Conveyancing Act, 1874, and that the amount of a casualty of composition is to be estimated as it was before 1874, namely, according to the rent of the year in which a demand is made. Compensation payable on the redemption of casualties under the Feudal Casualties (Scotland) Act, 1914, is fixed as at the date at which redemption takes place, which seems to imply that, for that purpose, the rental and deductions are to be ascertained as at that date.<sup>4</sup>

SUBSECTION (6).—*Only one Casualty Exigible at one Time.*

259. The superior's right to exact a casualty is confined to exacting it from the proprietor in possession for the time. The casualty is paid for the proprietor's own entry, and on payment by that proprietor no further casualty is exigible while he is alive. Intermediate entries do not affect this, and the proprietor in possession when the last-entered vassal dies cannot be called on to pay in respect of these intermediate disponees, although they may be impliedly entered by virtue of the Conveyancing Act of 1874.<sup>5</sup> If, on the casualty becoming exigible, the superior makes no demand, but allows the person then in possession to convey the lands to another, and that other to sell them to a third party, the superior has no right against any of the holders of the land after they have become divested. He must go against the proprietor in possession at the time when he makes his claim.

<sup>1</sup> Bell, Prin. s. 720; Ersk. ii. 5, 29.

<sup>2</sup> *Mason v. Ritchie's Trs.*, 1918 S.C. 466.

<sup>3</sup> 1903, 5 F. 619.

<sup>4</sup> The decisions on what is the year to be taken cannot be reconciled. In *Sivright v. Straiton Estate Co.*, 1879, 6 R. 1208, the Court rejected the year of demand. In *Sturrock v. Carruthers' Trs.*, 1880, 7 R. 793, and in *Stewart v. Murdoch*, 1882, 19 S.L.R. 649, the year of the last-entered vassal was taken. In *Houstoun v. Buchanan*, 1892, 19 R. 524, it was held that, in any event, the year could not be one prior to 1874. In *Mounsey v. Palmer*, 1884, 12 R. 236, the year of the death of the last entered vassal was taken. On the other hand, the year of implied entry has been adopted in a series of cases, viz. *Campbell v. Stuarts*, 1884 (O.H.) 22 S.L.R. 292; *Houstoun*, *supra*; *Stewart v. Watt*, 1899 (O.H.), 7 S.L.T. 253; and *Campbell v. Duncan*, (O.H.) 1913, 1 S.L.T. 260.

<sup>5</sup> *Mounsey v. Palmer*, 1884, 12 R. 236.

260. Where the payment of casualties is regulated by the express terms of the feu-right, the superior may, however, be entitled to exact more than one casualty. Thus, if a feu-right contains a valid clause against subinfeudation, together with an obligation to pay a casualty on each transfer, then, so soon as a vassal records his title, he is entered with the superior, and the superior becomes his creditor for the casualty exigible. Accordingly, the superior of such a feu may have a right to recover casualties from each of the parties who had successively held the lands. Infeftment, in other words, on such a title creates a debt against the disponent for the time being, irrespective of a demand being made, and a vassal does not get rid of his liability by divesting himself of the property.<sup>1</sup>

#### SECTION 4.—LIABILITY OF CORPORATIONS, TRUSTEES, HERITABLE CREDITORS, ETC.

##### SUBSECTION (1).—*Corporations and Trustees.*

261. At common law, neither corporations nor trustees could force an entry with the superior except on the footing of making some equitable provision for the payment of casualties.<sup>2</sup> A corporation never dies, and if a superior once accepts a corporation as vassal, he loses all right to further casualties except in so far as his claims have been expressly protected by stipulations in the feu-rights.<sup>3</sup> So also if a body of trustees has obtained an entry, the superior could, at common law, exact no further casualty until the last survivor of the trustees had died.<sup>4</sup> Whether or not an entry has been granted to a corporation or to a body of trustees is a question of fact.<sup>5</sup>

262. The entry of corporations and of trustees is now regulated by s. 5 of the Conveyancing Act, 1874. This section only applies if there is no stipulation in the feu-rights regulating payment of casualties by the corporation or trustees. If a corporation or a body of trustees acquires lands, and the last vassal who paid a casualty dies after the passing of the Conveyancing Act, 1874, a composition is exigible from the corporation or body of trustees whether or not infeftment has been taken.<sup>6</sup> On the expiry of twenty-five years from the payment by the corporation or trustees of the first casualty, another composition is due, and so on every twenty-five years, while the lands are vested in the corporation. If the feu-rights stipulate for a

<sup>1</sup> *Church of Scotland v. Watson*, 1905, 7 F. 395; *Fife Coal Co. v. Bernard's Trs.*, 1907 S.C. 494.

<sup>2</sup> *Hill v. Edinburgh Merchant Co.*, Jan. 17, 1815, F.C.

<sup>3</sup> *Ersk. ii.* 4, 43; *Governors of Heriot's Trust v. Drumsheugh Baths Co.*, 1890, 17 R. 937; *Earl of Lauderdale v. Hogg*, 1897, 24 R. 914.

<sup>4</sup> *Hill, supra*; *Ersk. ii.* 7, 7; *Bell, Conv. ii.* 1142-6.

<sup>5</sup> *Campbell v. Orphan Hospital*, 1843, 5 D. 1273; *Crawfurd v. Dempster*, 1879, 6 R. 708; *Milroy's Trs. v. Mags. of Leith*, 1911 (O.H.), 2 S.L.T. 514; *Mags. of Edinburgh v. School Board of Leith*, 1915 S.C. 137.

<sup>6</sup> *Governors of Heriot's Trust v. Drumsheugh Baths Co.*, 1890, 17 R. 937.

taxed composition on sale or transfer, as well as on the death of the last-entered vassal, and a casualty is due as the result of such acquisition, a second composition is payable by the corporation or trustees at the end of fifteen years from the date of such acquisition by the corporation or trustees, and every fifteen years thereafter. On the corporation or trustees ceasing to be proprietors after having paid a composition or compositions in terms of s. 5, the successor of the corporation or trustees, who shall be duly infeft at the expiry of twenty-five years (or fifteen years in the case of contractual casualties) from the date of the last payment of composition, shall pay composition, and liability for casualties is thereafter governed by the ordinary rules. The first composition payable by a corporation, although payable simply because the fee is vacant, is a composition paid in terms of s. 5 of the Act.<sup>1</sup> The twenty-five years run from the time the first casualty is demanded.<sup>2</sup> The section, so far as dealing with successors of corporations or trustees, only applies to the case of taxed compositions, and therefore, although an untaxed casualty is stipulated for on each transfer as well as on death, a casualty would be demandable only every twenty-fifth year. The redemption of casualties in respect of the entry of corporations is regulated by s. 12 of the Feudal Casualties (Scotland) Act, 1914.

SUBSECTION (2).—*Whether a Trust constitutes a New Investiture.*

**263.** Trustees who are in possession of lands in virtue of the testamentary writings of the last-entered vassal, and who do not hold for behoof of his heir, are singular successors, and are liable in payment of composition.<sup>3</sup> If the trustees hold for the heir, whom failing for strangers to the last investiture, the casualty exigible is composition.<sup>4</sup> Even where trustees held solely for behoof of the heir, they have been found liable for composition. In order to obtain an entry by paying relief duty, they must tender the heir as vassal.<sup>5</sup> The right to obtain an entry on payment of relief is a right personal to the heir, and he must claim entry in that character.<sup>6</sup> Prior to the passing of the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887,<sup>7</sup> it was held that the infeftment of trustees, holding simply for the heir-at-law of the truster, did not create a new investiture, and that if the trustees had conveyed to the heir prior to any demand having been made for a casualty, the heir was liable only for relief duty.<sup>8</sup> The question depends on whether the trust-disposition operates as a virtual disinherison of

<sup>1</sup> *Trades' Maiden Hospital v. Mackersy*, 1907 S.C. 73.

<sup>2</sup> *Governors of Heriot's Trust v. Caledonian Insurance Co.*, 1901, 6 F. 442.

<sup>3</sup> *Rossmore's Trs. v. Brownlie*, 1877, 5 R. 201; *Rankin's Trs. v. Lamont*, 1880, 7 R. (H.L.) 10.

<sup>4</sup> *Grindlay v. Hill*, Jan. 10, 1810, F.C.

<sup>5</sup> *Crawfurd v. Dempster*, 1879, 6 R. 708, at p. 712.      <sup>6</sup> *Grindlay*, *supra*; Ersk. ii. 7, 7

<sup>7</sup> *Crawfurd*, *supra*; *Johnstone v. Duke of Buccleuch*, 1892, 19 R. (H.L.) 39.

<sup>8</sup> *Stuart v. Jackson*, 1889, 17 R. 85, at p. 96; *Mags. of Edinburgh v. Irwin's Trs.*, 1902, 4 F. 937, at p. 943.



the heir. If he can claim the estate only as a beneficiary under the trust, composition is exigible, and not relief.<sup>1</sup>

264. The liability of trustees when called on to pay a casualty is now regulated by s. 1 of the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887, which provides that if trustees hold an estate under a *mortis causa* writing, which directs them to convey it to the heir of the testator at some time within twenty-five years, or which gives the ultimate beneficial interest to the heir, they are not liable for any casualty other than the heir would have had to pay had he taken the estate direct. If the trustees pay a casualty, then the heir on his entry is not liable for any further payment; but on his death another casualty becomes due whether he became entered or not. The section does not apply to an *inter vivos* deed conveying estate to trustees.<sup>2</sup> To obtain the benefit of the section, the trustees must either hold for the heir absolutely or under a destination which prevents their introducing a stranger to the investiture.<sup>3</sup> If the heir's right is contingent at the time when the casualty is demanded, composition will in that case be payable for the trustee's entry.<sup>4</sup> Where trustees are infeft under an *inter vivos* deed which is a mere burden on the title, as in the case of a trust for creditors,<sup>5</sup> or for special purposes,<sup>6</sup> a new investiture is not thereby created. Even where the trust is created by a *mortis causa* deed, but is temporary in character, the heir may enter on payment of relief.<sup>7</sup> Redemption of casualties in respect of the entry of trustees and payable under s. 5 of the 1874 Act is dealt with in s. 5 (1) (c) of the Feudal Casualties (Scotland) Act, 1914.

#### SUBSECTION (3).—*Heritable Creditors and Adjudgers.*

265. A bondholder is not a "singular successor" even when infeft in the lands.<sup>8</sup> The granting of a disposition *ex facie* absolute transfers the feudal right, and the disponent under it, in a question with the superior, is proprietor, and is liable in the prestations of the feu.<sup>9</sup> Accordingly a disponent under an *ex facie* absolute disposition as a singular successor is liable in composition.<sup>10</sup> If the person in possession of the lands is an adjudger, he may be liable for payment of composition, irrespective of the death of the last-entered vassal. An adjudger, on taking infeftment, is at once liable to the superior in composition,

<sup>1</sup> 50 & 51 Vict. c. 69.

<sup>2</sup> *Mags. of Edinburgh v. Irvine's Tr.*, 1902, 4 F. 937, per Lord Ordinary at p. 941.

<sup>3</sup> *Duke of Argyll v. Graham's Trs.*, 1912 S.C. 566.

<sup>4</sup> *Mags. of Edinburgh, supra*; *Moir's Trs. v. Duke of Argyll*, 1903, 6 F. 218.

<sup>5</sup> *Marquis of Huntly v. Earl of Fife*, 1887, 14 R. 1091; *Lord Home v. Lyell*, 1887, 15 R. 193.

<sup>6</sup> *Hope v. Duke of Hamilton*, 1883, 10 R. 1122; *Duke of Sutherland v. Matheson*, 1903 (O.H.), 11 S.L.T. 372.

<sup>7</sup> *Lord Home, supra*.

<sup>8</sup> *Campbell v. Deans*, 1890, 17 R. 661; *Darroch v. Ranken*, 1855, 17 D. 935.

<sup>9</sup> *Clark v. City of Glasgow Life Assurance Co.*, 1854, 17 D. (H.L.) 27.

<sup>10</sup> *Marquis of Huntly v. Earl of Fife*, 1887, 14 R. 1091; *Tough v. Macdonald*, 1905 7 F. 443; but see *Edinburgh Entertainments, Ltd. v. Stevenson*, 1926 S.C. 363.



whether the feu be feudally empty or not. An adjudger's right to entry is statutory, and it is given in return for payment of the statutory fine or composition.<sup>1</sup>

SUBSECTION (4).—*Pro Indiviso Proprietors, Heirs-Portioners, Liferenters.*

266. When lands have been held by *pro indiviso* proprietors who have been expressly entered or who have paid a casualty, the superior is entitled on the death of any one of these proprietors to a casualty in proportion to the interest had by the deceased in the lands.<sup>2</sup> The same rule applies to the entry of heirs-portioners.<sup>3</sup> *Pro indiviso* superiors have a right to exact a casualty.<sup>4</sup> The composition exigible from a *pro indiviso* fiar is the rent of the share held by him.<sup>5</sup> Where a person succeeds partly as heir and partly as singular successor the casualty exigible is divided rateably to the character in which he succeeds; that is, it is computed in part as relief, and in part as composition.<sup>6</sup>

267. In ordinary circumstances the fiar is liable in payment of a casualty irrespective of the existence of a liferent. A claim to a casualty is excluded by the fact of a liferenter being in possession under a grant from the superior, or in respect of a conjunct fee already confirmed by the superior.<sup>7</sup> But the fact that a liferenter is infeft in the lands, and thereby entered by the Conveyancing Act, 1874, is no answer for the fiar to a demand on the part of the superior for payment of a casualty.<sup>8</sup> Sec. 5 of the Conveyancing Act, 1874, provides that "where by the terms of the feu-rights of the lands a taxed composition is payable on the occasion of each sale or transfer of the property as well as on the occasion of the death of each vassal, and where an entry is implied in terms of this Act in favour of two or more parties having separate interests as liferenter and fiar respectively, or as successive liferenters, a composition, or in the case of parties interested *pro indiviso* a rateable share of a composition, shall be due by and exigible from each of the parties who shall take or derive benefit under the implied entry in the order in which they shall severally take or derive benefit under such implied entry, with such interest, if any, as may be stipulated for in the feu-right during the not payment of casualties."

268. By s. 14 of the Feudal Casualties (Scotland) Act, heirs of entail, liferenters, corporations, trustees, judicial factors, tutors, curators and other guardians, heritable creditors in possession, and other persons in receipt of the income of any estate of property or of superiority are entitled to exercise the powers of redemption conferred by that Act, and their

<sup>1</sup> Graham Stewart, Law of Diligence, 627, and cases cited there.

<sup>2</sup> *Governors of Caivin's Hospital v. Falconer*, 1863, 1 M. 1164.

<sup>3</sup> *Lady Lauss v. Inglis*, 1678, Mor. 15023.

<sup>4</sup> *Cargill v. Muir*, 1837, 15 S. 408.

<sup>5</sup> *Wemyss v. Thomson*, 1836, 14 S. 233; *Edinburgh Magistrates v. Edinburgh Ropery Co.*, 1878, 6 R. (H.L.) 1.

<sup>6</sup> *Duke of Argyll v. Riddell*, 1912 S.C. 694; 1912, 1 S.L.T. 221.

<sup>7</sup> Bell, Conv. i. 623; Stair, ii. 4, 23.

<sup>8</sup> *Stuart v. Jackson*, 1889, 17 R. 85.

exercise of such powers will bind all persons interested in the feus or superiorities.

#### SECTION 5.—TAXATION OF CASUALTIES.

269. When the feu-right stipulates for a fixed sum to be paid in lieu of the statutory composition or customary relief, the casualty is said to be taxed. The taxing clause should appear in the original feu-right, and, if it appears there, its omission in charters by progress or precepts of *clare constat* does not extinguish it.<sup>1</sup> The taxing clause should appear in the *reddendo*, but the validity of such a clause has been sustained where it occurred in the dispositive clause.<sup>2</sup> A taxing clause may, however, appear in the superior's title in such a way as to give the vassal a right to found upon it; and where the superiority has been disposed to a singular successor, without the insertion of the clause in the disposition, the vassal is entitled to the benefit of the taxing clause if he can shew it has been validly created a real burden on the superiority.<sup>3</sup>

270. Taxing clauses in old charters are read strictly against the vassal, as being a contractual restriction on the superior's legal claims.<sup>4</sup> A taxing clause may be in favour of the superior.<sup>5</sup> A taxation of the heir's entry does not imply a taxation of the entry of a singular successor.<sup>6</sup> Where the entry of heirs and successors or assignees is taxed, it has been held that the words "successors or assignees" refer to those prior to infeftment, and do not include singular successors, unless the deed shews a contrary intention.<sup>7</sup> The rule applies even where the sum payable on entry is called composition.<sup>8</sup> The presumption against the vassal may not be so strong in more modern charters.<sup>9</sup> If the context shews that singular successors were intended to obtain the benefit of the taxing clause, effect will be given to the intention of parties.<sup>10</sup> The taxation need not be expressly in lieu of casualties.<sup>11</sup> A taxing clause may be so framed as to limit its effect to a particular vassal or series of vassals.<sup>12</sup> The rule that taxing clauses are to be read *strictissimæ juris* and against the vassal, does not apply to such clauses in deeds relating to blench holdings. A taxation of "casualties" includes taxation of composition.<sup>13</sup> A common form of taxing clause taxes the casualty at double the feu-duty. This form is now regulated by the Duplicands of Feu-duties (Scotland) Act, 1920.<sup>14</sup>

<sup>1</sup> *Stewart, petr.*, 3rd June 1813, F.C.; *Hamilton v. Dunn*, 1853, 15 D. 925.

<sup>2</sup> *Mags. of Dundee v. Duncan*, 1883, 11 R. 145.

<sup>3</sup> *Learmonth v. Trinity Hospital*, 1854, 16 D. 580.

<sup>4</sup> *Mags. of Inverness v. Duff*, 1769, Mor. 15059; *M'Lachlan v. Tait*, 1823, 2 S. 303; but see *Hill's Trs. v. Kay's Tutor*, 1902, 4 F. 572, per Lord Kinnear at p. 575.

<sup>5</sup> *Earl of Mansfield v. Gray*, 1829, 7 S. 642.

<sup>6</sup> *Anderson v. Marshall*, 1824, 3 S. 334.

<sup>7</sup> *Hamilton v. Dunn*, 1853, 15 D. 925.

<sup>8</sup> *Thomson, petr.*, 22nd May 1810, F.C.

<sup>9</sup> *Mags. of Inverkeithing v. Ross*, 1874, 2 R. 48, at p. 62.

<sup>10</sup> *Hamilton, supra*; *Hill's Trs.*, *supra*.

<sup>11</sup> *Mags. of Dundee v. Duncan*, 1883, 11 R. 145.

<sup>12</sup> *Earl of Mansfield v. Gray*, 1829, 7 S. 642; *Learmonth v. Trinity Hospital*, 1854, 16 D. 580; *Christie's Trs. v. M'Dougall*, 1905, 7 F. 756.

<sup>13</sup> *Hill's Trs. v. Kay's Tutor*, 1902, 4 F. 572, at p. 575.

<sup>14</sup> 10 & 11 Geo. V. c. 34.

## SECTION 6.—CASUALTIES IN BURGAGE, BOOKING, UDAL, AND BLENCH HOLDINGS.

SUBSECTION (1).—*Burgage*.

271. No casualties are exigible from burgage holdings.<sup>1</sup> Where the magistrates of a burgh, however, have, prior to 1874, sub-feued burgage subjects to be held in feu-farm, feudal casualties will be exigible. It has been held to be competent to stipulate in burgage titles for periodical payments, but these are only personal conditions unless validly constituted real burdens. They may attach to the holder of the lands for the time being as an inherent condition of the grant, but they are not in themselves real burdens enforceable by real diligence.<sup>2</sup> But such a burden in a burgage holding is not created a real burden by being expressed in terms of a feu-farm grant. In one case, however, an obligation in a feu-contract dealing with burgage subjects was enforced against singular successors although it was not a real burden, on the ground that it was an inherent condition of the grant, and that the singular successor simply came into the shoes of the original vassal in a question with the superior.<sup>3</sup> This was a case of a taxed casualty. An immemorial custom in a burgh of exacting casualties from burgage subjects gives the magistrates no right to insist on these.<sup>4</sup>

SUBSECTION (2).—*Booking*.

272. Lands held by the tenure of booking are subject to the casualties paid from time immemorial. If the lands are held from the magistrates by feudal charter and sasine, the vassals are liable for feudal casualties.<sup>5</sup>

SUBSECTION (3).—*Udal Lands*.

273. No casualties are exigible in respect of these. Udal lands are free from the burden of feudal casualties, even although the title is in feudal form, unless it flows from a Crown charter. If a Crown charter is obtained by the superior, grants made by him prior to that date would not be affected so as to be made subject to payment of casualties.<sup>6</sup>

SUBSECTION (4).—*Blench*.

274. Lands held blench are liable to the same casualties as in feus. The amount of relief is the blench-duty, the amount of composition is the "year's maill." Where the lands have been sub-feued for a

<sup>1</sup> Ersk. ii. 4, 18; *Mags. of Perth v. Stewart*, 1830, 9 S. 225.

<sup>2</sup> *Mags. of Arbroath v. Dickson*, 1872, 10 M. 630.

<sup>3</sup> *Clark v. City of Glasgow Life Assurance Co.*, 1850, 12 D. 1047.

<sup>4</sup> *Mags. of Perth, supra*; *Chalmers v. Paisley Magistrates*, 1829, 7 S. 718.

<sup>5</sup> *Chalmers, supra*.

<sup>6</sup> *Spence v. Union Bank of Scotland*, 1894 (O.H.), 31 S.L.R. 904; *Bratton v. Gaudie*, 1832, 10 S. 286; *Smith v. Lerwick Harbour Trs.*, 1903, 5 F. 630.



blench-duty, the amount is the blench-duty. If a grassum also has been paid, it is treated as a capitalised feu-duty and a percentage on it is also payable as part of the composition.<sup>1</sup> The rule that a blench-duty is held to be payable *si petatur tantum*, and if not demanded within a year is held to have been satisfied, does not apply to the payment of casualties in a blench holding.<sup>2</sup>

#### SECTION 7.—CLAUSES OF RELIEF.

275. Under the law prior to 1874, a purchaser could compel the seller to enter if at the time of sale the subjects were in non-entry.<sup>3</sup> A purchaser still has the right to insist that the seller of heritable subjects should pay a casualty past due or exigible at the date of delivery of the disposition.<sup>4</sup> A purchaser does not bar himself from claiming relief from past-due casualties by accepting and recording a disposition.<sup>5</sup> A disposition of lands usually contains an express clause of relief, and a statutory form of clause is provided in s. 8 of the Titles to Land Consolidation (Scotland) Act, 1868.<sup>6</sup> This clause provides for the relief of a disponee from all casualties payable to or prestatable by the superior prior to the time of entry, but the statutory form is not obligatory. If there is no clause of relief, there is no liability on the disponent to relieve the vassal on a claim being made for a casualty exigible but not demanded prior to the date of the disposition.<sup>7</sup> A clause of relief is personal to the disponee, and if the disponee conveys to a third party, the latter must have an express assignation of the clause of relief to enable him to found upon it.<sup>7</sup> Although a casualty is not due until it is demanded, the clause of relief includes casualties which the superior had not, but could have, demanded prior to the date of sale.<sup>8</sup> The disponent may have to pay a larger sum under a clause of relief than if he had paid the casualty himself prior to disposing the property. The difference is still greater in the case of the disponee being the heir of the last investiture, and, as such, liable only in payment of relief duty; but it seems that under a clause of relief he is bound to relieve the disponee if the latter has to pay composition as the result of the fee being vacant at the date when the disposition was granted.<sup>9</sup> An obligation of relief does not prescribe in forty years.<sup>10</sup> If a vassal is called upon to pay a casualty, and gives notice of the claim to the disponent against whom he has a right of relief, he is entitled to the expenses of an unsuccessful

<sup>1</sup> *Mason v. Ritchie's Trs.*, 1918 S.C. 466; 1918, 1 S.L.T. 351.

<sup>2</sup> *Hill's Trs. v. Kay's Tutor*, 1902, 4 F. 572.

<sup>3</sup> *Gardiner v. Anderson*, 1799, Mor. 15037.

<sup>4</sup> *Straiton Estate Co. v. Stephens*, 1880, 8 R. 299.

<sup>5</sup> *Farquharson v. Caledonian Rly. Co.*, 1899, 2 F. 141.

<sup>6</sup> 31 & 32 Vict. c. 101, s. 8 and Sched. B.

<sup>7</sup> *Speirs v. Morgan*, 1902, 4 F. 1069.

<sup>8</sup> *Farquharson v. Caledonian Rly. Co.*, *supra*; *Tough v. Macdonald*, 1905, 7 F. 443.

<sup>9</sup> *Farquharson*, *supra*; *Speirs v. Morgan*, 1902, 4 F. 1069; *Sutherland v. Tait's Trs.*, 1902, 5 F. 90.

<sup>10</sup> *Hope v. Hope*, 1864, 2 M. 670.



defence if the disponent does not take up the action.<sup>1</sup> Although the granter of a disposition containing a clause of relief is only a security holder under an *ex facie* absolute disposition, he is bound to relieve the grantee of any casualty the latter has to pay if the fee was not full on the disposition being granted.<sup>2</sup>

#### SECTION 8.—LIFERENTER'S RIGHTS TO CASUALTIES.

276. Questions frequently arise as to whether a beneficiary, who is entitled to the annual income of an estate, has a right to any casualties falling due while he enjoys the usufruct of the estate. This depends on the terms of the testamentary deed, and is a question of intention.<sup>3</sup> A bequest of the "free annual income" of an estate has been held not to include a single casualty falling due once in nineteen years.<sup>4</sup> But where an estate consisted of a number of superiorities, and where casualties and duplicands were falling due with sufficient frequency to make them part of the produce of the estate, year by year, casualties were held to be included in the annual proceeds or income.<sup>5</sup> So casualties were held to be included in a trust conveyance of "the free annual proceeds and revenue,"<sup>6</sup> of "free yearly proceeds,"<sup>7</sup> or of "free income."<sup>8</sup>

#### SECTION 9.—DISCHARGE AND RENUNCIATION OF CASUALTIES.

277. Prior to 1874, the voluntary granting of an entry, or the granting by a superior to a vassal of a writ by progress, implied a discharge of all bygone casualties as well as the casualty demandable in respect of the entry given, unless the superior's right was expressly reserved.<sup>9</sup> The Conveyancing Act of 1874, by providing that lands are no longer to be deemed in non-entry, would have operated a discharge of casualties, and accordingly the rights of the superior to his casualties are expressly reserved (s. 4). A discharge of casualties may be effected by an express renunciation in a deed, which should be recorded; <sup>10</sup> by a disposition of the superiority in the vassal's favour; or by a disposition of the casualty in favour of the vassal, either in the original charter or in a charter of *novodamus*.<sup>11</sup> A superior discharges his claim to composition if he takes relief instead of composition when the latter could competently have been exacted by him, and, similarly, over-payment by a vassal cannot be recovered.<sup>12</sup> But if a superior accepts payment of a taxed casualty, and grants receipts, he is not

<sup>1</sup> *Straiton Estate Co. v. Stephens*, 1880, 8 R. 299.

<sup>2</sup> *Tough v. Macdonald*, 1905, 7 F. 443.

<sup>3</sup> *Montgomerie-Fleming's Trs. v. Montgomerie-Fleming*, 1901, 3 F. 591.

<sup>4</sup> *Gibson v. Caddall's Trs.*, 1895, 22 R. 889. <sup>5</sup> *Montgomerie-Fleming's Trs.*, *supra*.

<sup>6</sup> *Fisher's Exrx. v. Fisher's Trs.*, 1903, 6 F. 196.

<sup>7</sup> *Dunlop's Trs. v. Dunlop*, 1903, 6 F. 12.

<sup>8</sup> *Ross's Trs. v. Nicoll*, 1902, 5 F. 146.

<sup>9</sup> *Tailors of Glasgow v. Blackie*, 1851, 13 D. 1073.

<sup>10</sup> *Stuart v. Jackson*, 1889, 17 R. 85.

<sup>11</sup> Bell, Conv. i. 627.

<sup>12</sup> *Lord Advocate v. Moray*, 1894, 21 R. 552.

barred from recovering arrears, if the parties were mistaken as to the amount due.<sup>1</sup> A superior discharges all claims against a proprietor for payment of untaxed casualties so soon as he allows that proprietor to dispoise the lands to a third party without making any demand. This rule does not apply to contractual casualties.<sup>2</sup>

278. Omission to demand a casualty for forty years does not extinguish the right to demand payment of a casualty.<sup>3</sup> In the case of a taxed casualty becoming due at a specified date a superior would lose his right if he did not exact payment within the prescriptive period. The same rule would apply to contractual casualties. A casualty is not extinguished *confusione* by the same party holding both the superiority and the property at the time when the casualty becomes exigible, unless either consolidation has taken place or possession on the double title has been had for the prescriptive period.<sup>4</sup>

279. By s. 13 of the Feudal Casualties (Scotland) Act, 1914, all claims for loss of casualties under the Lands Clauses Acts shall be held to be discharged if not demanded within fifteen years of the commencement of that Act. But this applies only when the title is a statutory one.<sup>5</sup> The Act also provides (s. 8) that on payment or tender of the statutory compensation the superior is bound to grant a discharge of the casualties redeemed, subject to consents of heritable creditors holding securities over the superiority.

#### SECTION 10.—HOW PAYMENT IS ENFORCED.

280. Prior to 1874 a superior, if the casualty exigible by him was one arising *ex lege*, and not *ex contractu*, had to enforce payment by means of a declarator of non-entry, which declared that the lands were in non-entry, that the bygone non-entry dues from the last vassal's death until the date of citation belonged to him, and that the full rents, maills, and duties of the lands belonged to him from the date of citation. This action was incompetent while the last-entered vassal was alive, and the effect of decree in the action was merely to give the superior possession of the lands until someone came forward to pay the casualty and take an entry. If the claim to a casualty was based on a contractual stipulation in the feu-right granted by him, the superior's remedy was a petitory action combined with any declaratory or other conclusion that might be necessary. No lands being now in non-entry, a declarator of non-entry is no longer competent, but the Conveyancing Act of 1874 provides a statutory action of declarator and for payment of a casualty which is available only when, and if, prior to the passing of the Act, the old declarator of non-entry would

<sup>1</sup> *Alexander's Trs. v. Muir*, 1903, 5 F. 406.

<sup>2</sup> *Fife Coal Co., Ltd. v. Bernard's Trs.*, 1907 S.C. 494.

<sup>3</sup> *Stair* ii. 4, 23; ii. 12, 16; *Cheyne v. Smith*, 1832, 10 S. 622; *Governors of Cauvin's Hospital v. Falconer*, 1863, 1 M. 1164.

<sup>4</sup> *Motherwell v. Manwell*, 1903, 5 F. 619.

<sup>5</sup> *Heriot's Trust v. Caledonian Rly. Co.*, 1915 S.C. (H.L.) 52; 1915, 1 S.L.T. 347.

have been competent. The statutory action is declared to have the same effect as the old action. It contains no true petitory conclusions. It is accordingly in cases where, but for the passing of the Conveyancing Act of 1874, an action of declarator of non-entry would have been competent, that the statutory action may be used—that is, where, but for the passing of that Act, the lands would have been in non-entry through the death of the last-entered vassal. In all other cases a petitory action must be used, with declaratory or other competent conclusions, so far as these may be appropriate.

281. To give the superior a title to sue, he must be infeft in the lands or in the superiority of them.<sup>1</sup> Two or more persons holding the right of superiority *pro indiviso* have a title to sue for payment of a casualty.<sup>2</sup> The superior in possession at the date of making the demand is the superior entitled to sue; the right does not descend to the representatives of a deceased superior who could have demanded payment but did not do so.<sup>3</sup> The proper defender, prior to 1874, was the heir of the last-entered vassal, and the proprietor for the time being could as a rule insist on the heir being called. The defender in the modern statutory action is the successor in the lands, whether infeft or not, and implied entry under the Conveyancing Act is no defence.<sup>4</sup> The *onus* is on the superior to prove that he is the party entitled to the casualty and to prove the death of the last-entered vassal.<sup>5</sup>

282. The superior may also enforce payment by pointing the ground where the casualties are *debita fundi*, by exercising conventional irritancies, and, in the case of duplicands of ground annuals where the lands have been disposed in security thereof, by an action of mails and duties.<sup>6</sup> The existing remedies for obtaining payment of casualties exigible before redemption are left untouched by the Feudal Casualties (Scotland) Act, 1914.

#### SECTION 11.—TENDERING THE HEIR WHEN COMPOSITION IS DEMANDED.

283. Prior to 1874 a singular successor could escape payment of composition by bringing forward the heir and tendering him for entry on payment of relief. But it was not in the disponee's power to force the heir to enter. This right, however, has been limited by the implied entry introduced by the Conveyancing Act of 1874, and since the passing of that Act, a proprietor in possession who has taken infeftment cannot tender the heir, whether infeftment has been taken before or after 1874.<sup>7</sup> A proprietor, who is not infeft, can tender the

<sup>1</sup> *Mackenzie v. Munro*, 1869, 7 M. 676.

<sup>2</sup> *Cargill v. Muir*, 1837, 15 S. 408.

<sup>3</sup> *Stewart v. Watt*, 1899 (O.H.), 7 S.L.T. 253.

<sup>4</sup> Conveyancing (Scotland) Act, 1874, s. 4 (4); *Heriot's Hospital v. Carnegys*, 1884, 12 R. 30.

<sup>5</sup> *Marquess of Bute's Trs. v. Crawford*, 1914 S.C. 459; 1914, 1 S.L.T. 298.

<sup>6</sup> *Somerville v. Johnston*, 1899, 1 F. 726.

<sup>7</sup> *Rossmore's Trs. v. Brownlie*, 1877, 5 R. 201; *Sivright v. Straiton Estate Co.*, 1878, 5 R. 922.



heir for entry if there is no implied entry between the last-entered vassal and himself.<sup>1</sup> Trustees may tender the heir so long as he is uninfest.<sup>2</sup>

#### SECTION 12.—CONTRACTUAL CASUALTIES.

284. If the deeds constituting the feudal grant stipulate that a casualty is payable irrespective of the fee being vacant through the death of the last-entered vassal, the casualty exigible in virtue of such a stipulation is a contractual obligation. This class of casualties is governed by a special set of rules. When trustees, for example, on being granted an entry, agree to pay a composition every twenty-five years, the obligation thus constituted is contractual, and is enforced by a petitory action. The class of contractual casualties, however, in respect of which most difficulty occurs, is that constituted by a stipulation in the feu-rights that a casualty is payable not only on death but on each sale or transfer, irrespective of the death of the last-entered vassal. Such a stipulation is an addition to strict feudal law, and the burden is not, in every case, effectually imposed on singular successors in the lands. An artificial casualty cannot in our modern law be exacted irrespective of the death of the last-entered vassal, unless the superior could, by the law as it existed prior to 1874, have successfully compelled the disponee to pay. An obligation to pay a contractual casualty will be construed fairly, and not necessarily literally.<sup>3</sup>

285. This class of casualties has been frequently before the Courts, and the following rules may be deduced: (a) If there is in the feu-charter a valid clause against subinfeudation, an obligation to enter, or to pay a casualty on each sale or transfer, and an irritancy clause applicable to an infringement of these conditions which would amount practically to a forfeiture of the feu, then a casualty may be exacted not only on the death of the last-entered vassal, but also on each sale or transfer.<sup>4</sup> It is immaterial that the deed does not stipulate for "payment" of a casualty, if there is an obligation to enter. (b) An obligation in the feu-rights to pay a casualty, or to enter, without either a clause against subinfeudation or an irritancy clause, is not sufficient to entitle a superior to payment of a casualty on each transfer; it would only bind the parties to the contract, not singular successors.<sup>5</sup> (c) If there is a valid clause against subinfeudation and an obligation to enter on each sale or transfer, but no clause of irritancy, then, if the disponee records his disposition after 1874, he becomes liable, on so recording it, to pay a casualty in respect of his entry.<sup>6</sup> So long as the disponee continues uninfest under a title which is expressly *a me*, he has

<sup>1</sup> *Duke of Hamilton v. Guild*, 1883, 10 R. 1117.

<sup>2</sup> *Hope v. Duke of Hamilton*, 1883, 10 R. 1122.

<sup>3</sup> *Fife Coal Co. v. Bernard's Trs.*, 1907 S.C. 494.

<sup>4</sup> *Dick Lauder v. Thornton*, 1890, 17 R. 320; *Fife Coal Co. v. Bernard's Trs.*, 1907 S.C. 494.

<sup>5</sup> *Hamilton v. Chassels*, 1902, 4 F. 494; *Church of Scotland v. Watson*, 1905, 7 F. 395.

<sup>6</sup> *Church of Scotland*, *supra*.



no real right; but so soon as he takes infeftment by recording his disposition, he deliberately gives himself a real right. But in the case supposed, it is a condition of the grant that payment of a casualty is a necessary consequence of acquiring this real right, and therefore on taking infeftment the stipulated casualty becomes *ipso facto* due. "It behoved a disponee before recording his title after 1874 to consider what the effect of so recording it would be by virtue of the Conveyancing Act of 1874, just as much as before 1874 to consider what the effect of resigning into his superior's hands would have been." <sup>1</sup> (d) It is doubtful whether a clause against subinfeudation, whether fortified by an irritancy clause or not, is sufficient to make a casualty payable on infeftment being taken after 1874. In *Morris v. Brisbane*,<sup>2</sup> a feudisposition granted in 1833 contained a clause excluding subinfeudation, and the clause was fenced with an irritancy, but there was no obligation to pay a casualty, or to enter on each transmission of the subjects. It was maintained that the irritancy clause preventing subinfeudation enabled the superior to demand a casualty on each sale or transfer, but Lord Gifford's repudiation of this was distinct. "No action," he said, "could have lain at the superior's instance for the casualty now claimed. No action of declarator of non-entry would have been competent to the superior under the old law, and in no shape could the superior have enforced payment of any casualty when the claim was made." In the second branch of the *Church of Scotland* case (*supra*), however, a charter contained a clause prohibiting subinfeudation, fenced with an irritancy clause. There was no express stipulation either to enter or to pay a casualty on each transfer. The Court held that an express stipulation to pay was not necessary. "There is no condition binding the disponees to enter within three months" of each transfer, "but on the other hand the prohibition is fortified by a clause of irritancy, by force of which the disponee may be compelled to enter or to forfeit his feu." A composition on each transfer was accordingly held to be exigible by the superior. The cases seem to establish, in short, that wherever the superior could by the law before 1874 compel a vassal to pay a casualty, either by direct action on the contract, or by indirectly compelling him to pay under pain of forfeiting his right to the feu, a casualty can at the present day be exacted from singular successors, irrespective of the death of the last-entered vassal.

### SECTION 13.—ENTAILS.

286. The Act of 1685<sup>3</sup> authorising entails declared that nothing should prejudice the superior's casualties exigible from the entailed estate. An entail, however, while it lasts, excludes singular successors, and accordingly payment of composition cannot be exacted from heirs of entail. The institute under a deed of entail is liable for composition

<sup>1</sup> *Fife Coal Co.*, *supra*, per Lord Ordinary.

<sup>2</sup> 1877, 4 R. 515.

<sup>3</sup> 1685, c. 22.

if he is a singular successor. This payment of composition enfranchises the destination in the entail, so that subsequent heirs of entail, on the fee becoming vacant, are liable only for relief.<sup>1</sup> If the institute of entail is the heir of the existing investiture, he may enter on paying relief; but the superior is entitled to composition on the succession opening to a stranger.<sup>2</sup> A clause inserted in the deed by progress, reserving the superior's rights to exact casualties from singular successors, does not make the heirs of entail liable for more than relief after the destination has been enfranchised.<sup>3</sup> An institute under a deed of entail, if he is heir of the last investiture, is not bound to pay more than relief, but the superior in that case would be entitled to composition from the first substitute who is a stranger to the last investiture.<sup>4</sup> But if the superior exacts relief from the institute of entail, and the institute is a stranger to the last investiture, he cannot thereafter exact composition while the entail subsists.

287. The existence of an entail does not prevent the redemption of casualties under the Feudal Casualties (Scotland) Act, 1914. The provisions of s. 18 of the Conveyancing (Scotland) Act, 1874, are incorporated in s. 15 of the former Act and provide machinery for redemption whether the casualties are due by or to the entailed estate.

#### SECTION 14.—MISCELLANEOUS.

288. Prior to the passing of the 1874 Act, if a vassal who had subfeued his lands at a fair feu-duty, reacquired the sub-feu, and consolidated the sub-feu and the mid-superiority, the result of consolidation was to make the vassal liable to the superior for a year's rent of the lands, on a composition being demanded, instead of the sub-feu-duty, which was the extent of his liability while the lands remained in sub-feu. Sec. 7 of the 1874 Act alters the prior law by providing that the fact of consolidation taking place shall not increase the vassal's liability to pay a casualty. If a vassal was liable to pay only the sub-feu-duty before consolidation, then although he has consolidated the lands, his liability is not increased. It is doubtful if the rule would apply if, after consolidation and before any demand is made, the vassal were to dispoise the consolidated fee to a new vassal. Where the superior acquires the *dominium utile*, but does not consolidate the superiority and property title, and a casualty becomes exigible while he holds both the *dominium directum* and the *dominium utile*, there is no presumption that the casualty is extinguished *confusione*. There is no debt until a demand is made.<sup>5</sup>

289. In dealing with questions as to liability for, and the amount of, composition, the Court cannot give weight to equitable considerations.

<sup>1</sup> Ersk. ii. 7, 7; *Stirling v. Ewart*, 1844, 3 Bell's App. 128; *Johnstone v. Duke of Buccleuch*, 1892, 19 R. (H.L.) 39.

<sup>2</sup> *Marquess of Hastings v. Oswald*, 1859, 21 D. 871.

<sup>3</sup> *Stirling, supra*.

<sup>4</sup> *Lord Advocate v. Moray*, 1894, 21 R. 553. <sup>5</sup> *Motherwell v. Manwell*, 1903, 5 F. 619.

Their duty is to apply the statutes.<sup>1</sup> Composition is not rent, but the price paid for entry, and income-tax is due from the vassal on the rent of the year; and it is, at the same time, due from the superior on the amount of the casualty ingathered by him.<sup>2</sup> As a rule, interest on a past-due casualty is not allowed by the Court. It is, however, granted in special circumstances.<sup>3</sup>

#### SECTION 15.—THE FEUDAL CASUALTIES (SCOTLAND) ACT, 1914.

##### SUBSECTION (1).—*Compulsory Redemption of Casualties.*

290. The object of this Act is to abolish casualties by compelling their redemption before 1st January 1930 under the penalty of losing all right to them, and by prohibiting any recurring payment other than an annual feu-duty being stipulated for in any feu-writ granted after 1st January 1915. The Act covers not only casualties in the restricted sense, including composition, but also “duplicands and other multiples of feu-duties and grassums and other sums payable at intervals of more than one year,” under feus or ground annuals, whether created before or after 1st October 1874.<sup>4</sup> The general plan of the statute is to provide for payment to the superior of any casualty already due when redemption takes place, and for compensation to him in respect of his right to future casualties. This compensation may be in the form of a capital sum, or, in the option of the proprietor of the land, an addition to his annual feu-duty. In return for the compensation the superior is bound to grant a discharge of all his rights to casualties in the wide sense already explained.

291. The date by which redemption must take place may be extended for five years from 1st January 1930 if prior to that date judicial proceedings for recovery or redemption of any casualties or for compensation have been instituted and a notice of such proceedings is registered in the register of inhibitions and adjudications during the year immediately following the said date, in which case a further period of five years is allowed for the recovery or redemption of or compensation for the casualties with which the judicial proceedings are concerned.<sup>5</sup>

##### SUBSECTION (2).—*Procedure for Redemption.*

292. Redemption may be by agreement or by judicial proceedings under the Act, and either the superior or the proprietor of the feu may institute these proceedings. Where such proceedings are necessary, the

<sup>1</sup> *Earl of Home v. Lord Belhaven and Stenton*, 1902, 5 F. (H.L.) 13; but see *Edinburgh Gas Co. v. Taylor*, 1843, 5 D. 1325, and *Pollokshaws Co-operative Society v. Stirling Maxwell*, 1906, 8 F. 638.

<sup>2</sup> *Macgregor v. Commissioners of Inland Revenue*, 1839, 16 R. 438.

<sup>3</sup> *Mags. of Edinburgh v. Horsburgh*, 1834, 12 S. 593; *Marquis of Tweeddale v. Aytoun*, 1842, 4 D. 862.

<sup>4</sup> Sec. 3.

<sup>5</sup> Sec. 4 (3).



party seeking to redeem must give notice to the other of his intention by a notice in statutory or similar form, and this notice is irrevocable.<sup>1</sup> The compensation payable, failing agreement, is fixed at the date of the notice, bearing interest therefrom at 4 per cent. until paid or converted into an addition to the feu-duty. If before the notice is given any casualty is exigible and is either demanded or tendered, the date of demand or of tender is to be taken as the date for fixing the amount of compensation. What is redeemed under the Act is the right to future casualties, and before redemption can take place any casualty which has become due at or prior to the date at which compensation is to be fixed, and for which the proprietor of the feu is personally liable or which can be made good against the feu, must be paid prior to redemption.<sup>2</sup> The general law of casualties already stated applies to these casualties.

293. The compensation payable as redemption of the right to future casualties becomes a personal debt due by the proprietor of the feu to the superior, and also a real burden on the feu preferable to all securities or burdens not incidents of tenure. The feu thus burdened is that to which the compensation applies, that is, the property or mid-superiority, as the case may be, in respect of which redemption has taken place. Payment may be made in a single capital sum. The proprietor of the land, however, has the right to have the compensation converted into an annual payment equal to 4 per cent. on the capital sum.<sup>3</sup> A memorandum of this annual amount, signed by the parties or their agents, is recorded in the appropriate register of sasines, whereupon it becomes an addition to the existing feu-duty with all its legal qualities. The proprietor has the right to redeem such annual payment at any term at which it is payable, on giving three months' notice in writing to the superior, and paying or tendering a sum equal to twenty-five times the additional feu-duty. The liability for the annual addition runs from the proprietor's formal election to convert. Until then, interest at 4 per cent. runs on the capital sum which has been arrived at as the amount of compensation.

#### SUBSECTION (3).—*Measure of Compensation.*

294. The compensation is assessed, as in the commutation of casualties under the Conveyancing (Scotland) Act, 1874, on the basis of a multiple of the highest casualty exigible from the land.<sup>4</sup> As, however, redemption is made compulsory within a time limit, two important adjustments are introduced by the Act of 1914.<sup>5</sup> An allowance or discount is made from the multiple of the highest casualty proportionate to the interval between the date of redemption and the known or assumed date when the next casualty would have been exigible. The

<sup>1</sup> Sec. 11.

<sup>2</sup> Sec. 4 (1).

<sup>3</sup> Sec. 9.

<sup>4</sup> Conveyancing (Scotland) Act, 1874, s. 15.

<sup>5</sup> Sec. 5.



discount period is based on the expectation of life of the person on whose death the next casualty depends. Schedule A annexed to the Act gives a table for ascertaining the expectation of life according to the age at the date of redemption.<sup>1</sup> Calculation is then made of what sum at the date of redemption would produce, at 4 per cent. simple interest, the amount of compensation in the years of expectation of life according to Schedule A. This sum is modified generally to three-fifths where the casualty is not the ordinary one payable merely on death of the last-entered vassal. The other adjustment depends on the possibility that the next casualty exigible may be relief and not composition. If relief is less than what would be payable on the entry of a singular successor, a modification is made where the age of the redeeming proprietor exceeds forty-four in the case of males and forty-eight in the case of females. It consists, where the casualty is exigible on death only, in increasing the discount period to twenty-five years where otherwise it would be under that figure; and where the casualty is exigible on transfer as well as on death, the discount period is increased to fifteen years where the period applicable to such casualties would otherwise have been less. Accordingly, in order to estimate the amount of compensation, the highest casualty must be ascertained and the requisite multiple made of it, and the sum is then adjusted by the discount based on expectation of life and by the abatement due to the possibility of the next casualty being relief. The Crown, on entering a singular successor of the last-entered vassal, is not entitled to exact a year's rent as composition, and such year's rent cannot be taken as the "highest casualty" for that purpose.<sup>2</sup>

295. The Act deals with six modes of incidence.<sup>3</sup> Where casualties are exigible on the death of the last-entered vassal, the multiple of the highest casualty is one and a half. Where they are exigible on the occasion of each sale or transfer, as well as on death, the multiple is two and a half. When casualties are payable at intervals of twenty-five years under s. 5 of the 1874 Act, the compensation is such sum as will, with the addition of simple interest at 4 per cent., produce on the next recurrence of the fixed interval one and a half times the highest casualty, and if they are payable at intervals of fifteen years, two and a half times the highest casualty. The compensation for fixed duplicands is such sum as will, with the addition of simple interest at 4 per cent., produce on the next recurrence of the fixed interval a sum representing thirty-seven and a half times the highest casualty, divided by the number of years constituting such interval. The remaining two modes dealt with in the Act are special and are of limited interest.<sup>4</sup>

<sup>1</sup> Sec. 6.

<sup>2</sup> *Lord Advocate v. Marquess of Zetland*, 1920 S.C. (H.L.) 1; 1919, 2 S.L.T. 269.

<sup>3</sup> Sec. 5 (1) (a) to (f).

<sup>4</sup> For a full discussion of the Act and detailed examples, see Burns, *Extinction of Casualties*, 2nd ed., 1916.

SECTION 16.—THE DUPLICANDS OF FEU-DUTIES (SCOTLAND)  
ACT, 1920.

296. A common form of taxing clause taxes the casualty at double the feu-duty. Much litigation has taken place as to whether the particular words of such clauses meant a payment of twice the feu-duty in addition to the feu-duty of the year or simply of an additional feu-duty.<sup>1</sup> This Act<sup>2</sup> was passed in order to settle definitely the interpretation of such taxing clauses. Where under any feu provision has been made for payment of a duplication of the feu-duty on any periodical occasion, including entry of a vassal, the payment is to be deemed as payment of an additional feu-duty unless the feu-writ declares otherwise. Where under any feu it is provided that, on any such periodical occasion, payment shall be made of a duplicand or double of the feu-duty, or that the feu-duty shall be doubled, such payment shall be deemed to be inclusive of the feu-duty of the year. The amount of the casualty payable to the superior in that case shall, for the purpose of the Feudal Casualties (Scotland) Act, 1914, and for all other purposes, be the amount of one year's feu-duty only, unless such payment is expressed to be over and above such feu-duty or is otherwise unequivocally declared not to include the feu-duty of the year. If a superior, although by the terms of the feu-writ he is entitled to twice the feu-duty in addition to the feu-duty for the year, has claimed or accepted a single feu-duty in payment of his casualty, the casualty payable, for the purposes of the Feudal Casualties (Scotland) Act, 1914, and for all other purposes, shall be one year's feu-duty only in addition to the feu-duty of the year.<sup>3</sup>

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<sup>1</sup> *Earl of Zetland v. Carron Co.*, 1841, 3 D. 1124.

<sup>2</sup> 10 & 11 Geo. V. c. 34.

<sup>3</sup> *Warrender's Trs. v. Lauder's Trs.*, 1921, 2 S.L.T. 136.

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## CASUS AMISSIONIS.

See PROVING OF THE TENOR.

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## CASUS IMPROVISUS.

See MAXIMS; STATUTE LAW.

## CATHOLIC AND SECONDARY CREDITORS.

*See* RIGHT IN SECURITY.

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## CATHOLICS.

*See* ROMAN CATHOLICS.

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## CATTLE, INJURIES BY AND TO

*See* NEGLIGENCE.

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## CATTLE STEALING.

*See* CRIME.

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## CAUSA COGNITA.

## CAUSA DATA CAUSA NON SECUTA.

*See* MAXIMS.

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## CAUSA PROXIMA ET NON REMOTA SPECTATUR.

*See* DAMAGES (MEASURE OF); INSURANCE (MARINE);  
MAXIMS.

# CAUTION, JUDICIAL.

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### SECTION 1.—CAUTION IN SUSPENSION AND SUSPENSION AND INTERDICT. See BILL CHAMBER.

### SECTION 2.—CAUTION *JUDICIO SISTI*.

297. This is the technical description of caution found to abide judgment within the jurisdiction of the Court.<sup>1</sup> In a civil cause, Professor Bell points out in his Commentaries, no man is required, as an ordinary step of procedure, to appear personally in Court. If he is not meditating removal from the country, no circumstance whatever can entitle a creditor suing him to insist on bail for his appearance in person, whether he be a domiciled Scot or a foreigner. If, however, he expose himself to a charge of *meditatio fugæ*, he may be compelled to find caution to remain within the jurisdiction.<sup>2</sup> Practice is more strict than the principle upon which it is founded, and the obligation in the bond of caution *judicio sisti* is expressed that the party shall appear personally and attend personally all or any of the diets of Court.<sup>3</sup>

298. It has been decided (1) that the cautioner is liable unless the debtor be presented personally in Court, unprotected and as open to diligence as at the time of arrestment on *fugæ* warrant; (2) that the pursuer may make his requisition for the presentation of the debtor at any time during the litigation, or after decree, at any time before the lapse of the period allowed for extracting, or even at any time before extract.<sup>4</sup> The obligation of the cautioner when the bond is forfeited,

<sup>1</sup> Bell, Prin. s. 274.

<sup>3</sup> *Ibid.*, i. 399.

<sup>2</sup> Bell, Com. i. 398.

<sup>4</sup> *Ibid.*



is for the debt in the decree, interest, and expenses, but he is entitled to insist on the action being carried to judgment.<sup>1</sup>

299. Where caution is found, after decree against the debtor, by bond of presentation, the cautioner is not entitled to question the decree, the object of the bond in such case being to allow the debtor a little time to provide for payment of the debt, not to afford him leisure and opportunity to challenge it in another process.<sup>2</sup>

300. The cautioner's obligation may be discharged (1) by the death of the debtor; <sup>3</sup> (2) by notice to the creditor, with presentment of the debtor's person in Court; <sup>4</sup> (3) by presentment on the creditor's requisition; and (4) by decree extracted without requisition by the creditor.<sup>5</sup> Since the abolition of imprisonment for debt and the decision in *Hart's* case, warrants for arrestment *in meditatione fugæ* have become rare.<sup>6</sup>

301. Caution *judicio sisti* is required in loosing an arrestment *ad fundandam jurisdictionem*.<sup>7</sup> In criminal cases, where the apprehended person must appear personally in Court, it is in frequent use. See CRIME (PROCEDURE). By statute 1681, c. 16, caution *judicio sisti* and *judicatum solvi* was required in maritime cases in the Court of Admiralty, but this has been abolished both in the Sheriff Court <sup>8</sup> and in the Court of Session.<sup>9</sup>

### SECTION 3.—CAUTION *JUDICATUM SOLVI*.

302. This is the term applied to caution found to pay the sum decreed for in an action or to implement a decree. As stated above, caution in this form was formerly required in maritime cases in the Admiralty Court, but this practice is now abolished.<sup>10</sup> It is required in proceedings for loosing of arrestments and recalling of inhibition, and in proceedings in the Bill Chamber. The cautioner's obligation is for the full amount found due by his principal, including costs and interest. He is not liberated by the death of his principal. He is entitled, if necessary for the conduct of the case, to sist himself as a party. He is also entitled to the benefit of discussion.<sup>11</sup>

303. Cautioners in judicial bonds are not entitled to the benefits of the septennial limitation under the Statute 1695, c. 5.<sup>12</sup>

<sup>1</sup> Bell, Com. i. 400.

<sup>2</sup> *Cheyne v. M'Donald*, 1863, 1 M. 950. For forms of bond of presentation, see Juridical Styles, ii. 447; Bell, Prin. ss. 277-8. <sup>3</sup> *Park v. Storie*, 1680, 3 Bro. Sup. 318.

<sup>4</sup> *Lindsay v. Fairfoull*, 1633, M. 2031; *M'Culloch*, 1666, M. 369; *Stevenson v. Chisholm*, 11th March 1812, F.C.; *Clark v. Bremner*, 1881, 9 R. 372.

<sup>5</sup> *Telfer v. Muir*, 1774, M. 2054; *Brown & Co. v. Wilson*, 1790, M. 2059; *Stewart v. Fraser*, 8th July 1809, F.C.; Bell, Prin. s. 274.

<sup>6</sup> 43 & 44 Vict. c. 34; 45 & 46 Vict. c. 42; *Hart v. Anderson's Trs.*, 1890, 18 R. 169.

<sup>7</sup> Ersk. i. 2, 19.

<sup>8</sup> 1 & 2 Vict. c. 119, s. 22.

<sup>9</sup> 13 & 14 Vict. c. 36, s. 24. For form of bond *de judicio sisti*, see Jur. Styles, 6th ed., ii. 915.

<sup>10</sup> 1 & 2 Vict. c. 119, s. 22; 13 & 14 Vict. c. 36, s. 24.

<sup>11</sup> For form of bond *judicatum solvi*, see Jur. Styles, 6th ed., ii. 915.

<sup>12</sup> Bell, Com. i. 401; *Hope v. Fowles*, 1715, Mor. 2152; *M'Kinlay v. Ewing*, 1781, Mor. 2154.

SECTION 4.—*CAUTIO USUFRUCTUARIA.*

**304.** This is the caution given by a liferenter to the heir, that he will not abuse or injure the subject, and that it will be returned at the expiry of his liferent. This form of caution was introduced into Scotland by the Act 1491, c. 25, which, not proving effectual, was confirmed by the Act 1535, c. 15. Both these statutes were ratified by the Act 1594, c. 230, entitled an Act “anent the upholding of the decayed landes within burgh.” This last Act relates only to ruinous houses. The former Acts apply to liferenters holding by infeftment, to a liferent lessee, and to a donatar who has taken a gift of a liferenter’s escheat.<sup>1</sup> This caution is not now ordered unless there is shewn some reasonable cause to fear waste or neglect on the part of the liferenter.<sup>2</sup> It is, however, the only remedy open to the fiar for controlling the liferenter’s general management, for where waste has been already committed no action is competent to him who at the time holds the fee, as the damages are due only to that person to whom the fee shall open after the liferenter’s death.<sup>3</sup>

## SECTION 5.—CAUTION FOR VIOLENT PROFITS.

**305.** In an action of removing in the Sheriff Court, the defender may, in the Sheriff’s discretion, be ordered to find caution for violent profits,<sup>4</sup> and similarly in a suspension of a decree of removing such caution may be ordered. Violent profits are held to embrace not only the full profits which the landlord could have made if the lands or subjects were in his possession, but also all damages which the subjects may receive at the hands of the tenant.<sup>5</sup> In urban tenements the profits are generally estimated at double the stipulated rent.<sup>6</sup>

## SECTION 6.—CAUTION IN LAWBURROWS.

**306.** Lawburrows formerly proceeded upon letters passing the Signet, but that procedure has been abolished and they are now obtained on application to the Sheriff or Sheriff-Substitute or to a Justice of the Peace, who may order caution, the amount whereof shall be at the judge’s discretion.<sup>7</sup> It is in the power of the Sheriff, Sheriff-Substitute, or Justice of the Peace to order the party complained against to grant his own bond without caution.<sup>8</sup>

<sup>1</sup> *Caddel v. Douglas*, 1635, M. 8271.

<sup>2</sup> *Ralston v. Leitch*, 1803, Hume 293; Rankine on Land-Ownership, 4th ed., 746.

<sup>3</sup> *Bell and Halliday v. Bell*, 1827, 6 S. 221; Ersk. ii. 9, 59; Stair, ii. 6, 4; Rankine on Land-Ownership, *loc. cit.*; Bell, Prin. s. 1064.

<sup>4</sup> Sheriff Court Act, 1907, Sched. I. s. 121, as amended by 2 & 3 Geo. V. c. 28; *Inglis’ Trs. v. Macpherson*, 1910 S.C. 46.

<sup>5</sup> *Gardner v. Beresford’s Trs.*, 1877, 4 R. 1091, per Lord Pres. Inglis.

<sup>6</sup> *Watt v. Bell & Balfour*, 1822, 1 S. 556.

<sup>7</sup> Civil Imprisonment (Scotland) Act, 1882 (45 & 46 Vict. c. 42), s. 6; Dove Wilson, Sheriff Court Practice, p. 444; Jur. Styles, ii. 913; *Mackenzie v. MacLennan*, 1916 S.C. 617.

<sup>8</sup> Civil Imprisonment (Scotland) Act, 1882 (45 & 46 Vict. c. 42), s. 6 (7).

## SECTION 7.—CAUTION FOR EXPENSES.

SUBSECTION (1).—*In General.*

**307.** Caution for expenses is a matter entirely in the discretion of the Court, but the Court will not exercise its discretion in the way of ordaining a party, pursuer or defender, to find caution unless the interests of justice appear to demand it.<sup>1</sup> As a general rule a defender will not be ordained to find caution.<sup>2</sup>

**308.** Poverty in itself is no ground for requiring a litigant to find caution.<sup>3</sup> Where poverty is combined with receipt of parochial relief, the rule is to require the party to apply for admission to the Poor's Roll or to find caution.<sup>4</sup> There have, however, been many exceptions to this rule, and the circumstances of each case will be considered by the Court, that no undue hindrance may be placed in the way of a poor litigant obtaining justice.<sup>5</sup>

**309.** When the reporters on *probabilis causa litigandi* have reported unfavourably on a case submitted to them, caution is generally ordered before the party is allowed to proceed as an ordinary litigant,<sup>6</sup> but their report is not conclusive.<sup>7</sup> A litigant admitted to the Poor's Roll cannot be ordered to find caution.<sup>8</sup>

SUBSECTION (2).—*Bankrupt Pursuer.*

**310.** In the case of a bankrupt divested of the whole of his estate, whether by operation of the bankruptcy statutes or by his own voluntary deed, suing an action relative to that estate without the concurrence of his trustee, caution will be required, not on the ground of poverty but because the real interest in the suit is not in the bankrupt but in his trustee.<sup>9</sup> Actions of a personal character arising out of violence to property,<sup>10</sup> slander, or assault,<sup>11</sup> an action of accounting against the

<sup>1</sup> *Thom v. Andrew*, 1888, 15 R. 780, per Lord Young at p. 782; *Harvey v. Farquhar*, 1870, 8 M. 971.

<sup>2</sup> *Lawrie v. Pearson*, 1888, 16 R. 62; *Hoggs v. Caldwell*, 1882, 19 S.L.R. 452; *Stiven v. Fleming*, 1885, 22 S.L.R. 673.

<sup>3</sup> *Macdonald v. Simpsons*, 1882, 9 R. 696; *Porteous v. Pearl Life Insurance Co.*, 1901, 8 S.L.T. 430.

<sup>4</sup> *Hunter v. Clark*, 1874, 1 R. 1154; *Maclean v. Maclaren*, 1910, 1 S.L.T. 29; *Fraser v. Mackintosh*, 1901, 9 S.L.T. 117.

<sup>5</sup> *Macdonald v. Simpsons*, 1882, 9 R. 696; *Johnston v. Dryden*, 1890, 18 R. 191; *Gore v. Westfield Autocar Co.*, 1923 S.C. 100.

<sup>6</sup> *Robertson v. Meikle*, 1890, 28 S.L.R. 18; *Buchanan v. Ballantine*, 1911 S.C. 1368.

<sup>7</sup> *Thomson v. N.B. Ry. Co.*, 1882, 9 R. 1101; *Gore v. Westfield Autocar Co.*, 1923 S.C. 100.

<sup>8</sup> *Wepers v. Pearson & Jackson*, 1859, 21 D. 305.

<sup>9</sup> *Horn v. Sanderson & Muirhead*, 1872, 10 M. 295; *Clark v. Muller*, 1884, 11 R. 418, per Lord Pres. Inglis at p. 419; *Johnston v. Laird & Son*, 1915, 2 S.L.T. 24; *Ritchie v. McIntosh*, 1881, 8 R. 747; *Munro v. Mudie*, 1901, 9 S.L.T. 53; but see Opinions in *Johnstone v. Henderson*, 1906, 8 F. 689.

<sup>10</sup> *Thom v. Andrew*, 1888, 15 R. 780.

<sup>11</sup> *Stiven v. Fleming*, 1885, 22 S.L.R. 673; *Heggie v. Heggie*, 1855, 17 D. 802; *Collier v. Ritchie & Co.*, 1884, 12 R. 47; *Briggs v. Amalgamated Press, Ltd.*, 1910, 2 S.L.T. 298; but see *Cook v. Kinghorn*, 1904, 12 S.L.T. 186; *Miller v. J. & M. Smith, Ltd.*, 1908, 16 S.L.T. 268; *Johnston v. Laird & Son*, 1915, 2 S.L.T. 24.

bankruptcy trustee,<sup>1</sup> an action of reduction of an assignation in favour of the trustee,<sup>2</sup> a suspension of a charge on a decree in absence obtained by the firm of which the trustee was a partner and assigned to a third party,<sup>3</sup> an action by a bankrupt against his father's trustees for payment of an alimentary debt,<sup>4</sup> an action for delivery of working tools,<sup>5</sup> and an action for wages due to bankrupt for work done subsequent to sequestration,<sup>6</sup> have been treated as exceptions to this rule. In an application by a bankrupt for discharge he is not required to find caution,<sup>7</sup> nor in an appeal against the deliverance of a Sheriff refusing discharge.<sup>8</sup>

**311.** Where there is no trustee whose concurrence can be obtained, a bankrupt will be allowed to sue without finding caution. Thus a discharged bankrupt, whose trustee had also been discharged, was permitted without finding caution to sue for a debt which the trustee had taken no steps to recover.<sup>9</sup> In an action for slander brought by a person in England who was averred to be notour bankrupt within the meaning of the Debtors (Scotland) Act, 1880, the Court refused to order caution.<sup>10</sup>

#### SUBSECTION (3).—*Bankrupt Defender.*

**312.** A bankrupt defender does not, as a rule, require to find caution.<sup>11</sup> If, however, the bankrupt, though nominal defender, be really pursuer in the issue, caution will be required.<sup>12</sup> Where a decree of constitution only was asked against a bankrupt to enable a creditor to rank upon the bankrupt estate, and the trustee declined to sist himself as defender, the bankrupt was ordained to find caution.<sup>13</sup> In an action by a lady against her divorced husband for payment of her legal rights the pursuer averred that the defender had left Scotland and was disposing of his estate to the pursuer's prejudice. The Court ordained the defender to find caution.<sup>14</sup>

#### SUBSECTION (4).—*Married Women.*

**313.** A married woman, a beneficiary under a trust deed, without the concurrence of her husband or of the trustees under the deed,

<sup>1</sup> *Ritchie v. M'Intosh*, 1881, 8 R. 747.

<sup>2</sup> *Rogerson v. Rogerson's Tr.*, 1885, 22 S.L.R. 673.

<sup>3</sup> *Stephen v. Skinner*, 1860, 22 D. 1122.      <sup>4</sup> *Paton v. Paton's Trs.*, 1901, 8 S.L.T. 455.

<sup>5</sup> *Thom v. Caledonian Rly. Co.*, 1902, 9 S.L.T. 440.

<sup>6</sup> *M'Call v. Gattens*, 1905, 13 S.L.T. 149.

<sup>7</sup> *Scott v. Scott's Tr.*, 1914 S.C. 704.

<sup>8</sup> *Melrose-Drover, Ltd. v. Heddlie*, 1905, 7 F. 852.

<sup>9</sup> *Cooper v. Frame & Co.*, 1893, 20 R. 920; *Cunningham v. Skinner*, 1902, 10 S.L.T. 148.

<sup>10</sup> *Macrae v. Sutherland*, 1889, 16 R. 476.

<sup>11</sup> *Taylor v. Fairlie's Trs.*, 1833, 6 W. & S. 301; *Lawrie v. Pearson*, 1888, 16 R. 62; *Drew v. Robertson*, 1903, 11 S.L.T. 67; *Johnstone v. Henderson*, 1906, 8 F. 689; *Mackay v. Boswall-Preston*, 1916 S.C. 96.

<sup>12</sup> *Ferguson, Lamont & Co.'s Tr. v. Lamont*, 1889, 17 R. 282; *Robb v. Dickson*, 1901, 9 S.L.T. 224; *Richmond v. Railton's Tr.*, 1850, 12 D. 1017; *Professional and Civil Service Supply Association, Ltd. v. Lawson*, 1913, 2 S.L.T. 55.

<sup>13</sup> *Smith's Trs. v. M'Cheyne*, 1879, 16 S.L.R. 592.

<sup>14</sup> *Robertson v. M'Caw*, 1911 S.C. 650.



raised an action to enforce a claim against a person whom she alleged to be a debtor to the trust estate. The Court ordained her to find caution.<sup>1</sup> In a somewhat similar case, in which the property claimed was alleged to belong to the married woman herself, she was allowed to sue without caution.<sup>2</sup> A married woman, with concurrence of her husband, raised an action for damages for personal injury; the husband had by antenuptial marriage contract renounced his *jus mariti* and right of administration; during the proceedings he became bankrupt, and he and his trustee assigned all their interests in her favour; the Court refused to ordain her to find caution.<sup>3</sup> The wife of an undischarged bankrupt was ordered to find caution in an action, raised by her against the trustee in her husband's sequestration, for damages for assault alleged to have been committed four years before the raising of the action.<sup>4</sup> Under the Married Women's Property (Scotland) Act, 1920, the right of administration of a husband is abolished, and a married woman is capable of entering into contracts, incurring obligations, and of suing and being sued, as if she were not married.<sup>5</sup> Therefore questions of caution arising out of the status of a married woman will not now recur.

#### SUBSECTION (5).—*Actio Popularis*.

**314.** Where an action is raised to vindicate a public right, caution will not be required of the pursuer, though poor. If he is a *bona fide* representative of a class of persons and honestly seeking to preserve or establish their interest, he is looked upon as the true *dominus litis*, even although he is obtaining financial support from other members of the class.<sup>6</sup> But if a poor man is selected by wealthier people to insist upon a claim, he will be required to find caution unless these persons are willing to sist themselves to the action.<sup>7</sup>

#### SUBSECTION (6).—*Under Sale of Goods Act, 1893*.

**315.** Under the Sale of Goods Act, 1893,<sup>8</sup> where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the Court, to consign or give reasonable security for the payment of the price.<sup>9</sup>

<sup>1</sup> *Teulon v. Seaton*, 1885, 12 R. 971.

<sup>2</sup> *Sleigh v. Yeaman*, 1900, 8 S.L.T. 114.

<sup>3</sup> *Horn v. Sanderson & Muirhead*, 1872, 10 M. 295.

<sup>4</sup> *G. v. H.*, 1899, 1 F. 701.

<sup>5</sup> 10 & 11 Geo. V. c. 64, ss. 1 and 5.

<sup>6</sup> *Potter v. Hamilton*, 1870, 8 M. 1064.

<sup>7</sup> *Jenkins v. Robertson*, 1869, 7 M. 739; *Robertson v. Duke of Atholl*, 1905, 13 S.L.T. 22 and 215.

<sup>8</sup> 56 & 57 Vict. c. 71, s. 59.

<sup>9</sup> *Motor Plants, Ltd. v. Stewart & Co., et e contra*, 1909, 1 S.L.T. 478.

SUBSECTION (7).—*House of Lords Appeals.*

**316.** Where an award of expenses has been given in a cause, the person holding the award is entitled to interim execution pending appeal to the House of Lords, but this is usually granted only on caution for repetition in the event of the appeal proving successful.<sup>1</sup>

**317.** The Standing Orders require a party presenting an appeal to the House of Lords to give security for expenses by recognisance, either in person or by substitute, to the amount of £500 and a bond of £200, or in lieu of a bond by payment of £200 into the Security Account Fund of the House of Lords within one week after the presentation of the appeal to the House. The House will, on a special order made, accept £500 in lieu of a recognisance, if paid within the like period. A respondent does not require to give security. No recognisance is required from the Lord Advocate, or from a person suing *in forma pauperis*.<sup>2</sup>

SUBSECTION (8).—*Limited Companies.*

**318.** “Where a limited company is plaintiff or pursuer in any action or legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.”<sup>3</sup> The terms plaintiff and pursuer imply that the company must be *in petitorio*, in an action. Thus, where a company was pursuer in an action of reduction of a decree of registration of an English judgment on which had followed arrestment and dismantling of a ship, it was held not to be pursuer within the meaning of the statute but to be truly in defence, and the motion for caution *quoad* the reductive conclusions of the summons was refused.<sup>4</sup> Again, where a company was successful as pursuer in an action in the Sheriff Court, the defender appealed and moved that the pursuing company, which had meantime gone into liquidation, should be ordered to find caution. The Court held that the provisions of the Act did not apply to the respondent in the appeal.<sup>5</sup> But a company defender in an action does not become pursuer by reclaiming.<sup>6</sup>

**319.** In Scotland, differing from the practice in England, the liquidator of a limited company in liquidation invariably sues as pursuer

<sup>1</sup> *Ross v. Matheson & Son*, 1847, 10 D. 222; *Cochran v. Boyle*, 1849, 12 D. 302; *Steel Co. of Scotland v. Tancred, Arrol & Co.*, 1889, 26 S.L.R. 465; *King, Brown & Co. v. Anglo-American Brush Electric Light Corporation*, 1891, 18 R. 540; *Maclaren on Expenses*, i. 124.

<sup>2</sup> Standing Order IV.; Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 11.

<sup>3</sup> Companies (Consolidation) Act, 1908, s. 278; Companies Act, 1862, s. 69.

<sup>4</sup> *English Coasting and Shipping Co., Ltd. v. British Finance Co., Ltd.*, 1886, 13 R. 430, per Lord Pres. Inglis.

<sup>5</sup> *Star Fire and Burglary Insurance Co. v. Davidson & Sons*, 1902, 4 F. 997.

<sup>6</sup> *Sinclair v. Glasgow and London Contract Corporation*, 1904, 6 F. 818.

along with the company, and this has been held to relieve the company from finding caution, in respect that the liquidator becomes personally liable in expenses to the opposing parties to the action.<sup>1</sup>

**320.** The Court will not interfere with the discretion of the judge on the question of "credible testimony," or otherwise regarding caution, unless it be shewn that he has gone completely wrong.<sup>2</sup> In the case of a working-men's club, incorporated under the Companies Acts, which raised an action for slander against a newspaper, the existence of a guarantee fund of £253 was considered by the Lord Ordinary sufficient to warrant him in repelling a plea for caution.<sup>3</sup> A receiver of debenture holders of an English company who was authorised by the Court of Chancery to defend in the name of the company an action brought against it in Scotland was ordained to find caution for expenses, limited to £300.<sup>4</sup>

**321.** The Assurance Companies Act, 1909, s. 15, provides that where an application to wind up an assurance company is presented at the instance of policy holders, security for costs for such an amount as the Court may think reasonable shall be given.<sup>5</sup>

#### SUBSECTION (9).—*Election Petitions.*

**322.** Under the Parliamentary Elections Act, 1868, it is provided that caution to the amount of £1000 must be found, by the party presenting a petition complaining of an undue return or undue election, for all costs, charges, or expenses that may become payable by him. The bond of caution must be lodged within three days of presentation of the petition.<sup>6</sup>

#### SUBSECTION (10).—*Miscellaneous.*

**323.** If caution has been ordered and is not found, the opposite party is entitled to absolvitor or to decree by default.<sup>7</sup> Caution may be asked for at any time during the dependence of an action,<sup>8</sup> and, if refused, the application may be renewed should circumstances alter.<sup>9</sup> Undue delay in asking caution may, however, be a ground of refusal.<sup>10</sup> Con-

<sup>1</sup> *Sinclair v. Thurso Pavement Syndicate, Ltd.*, 1903, 11 S.L.T. 364; *Motor Plants, Ltd. v. Stewart & Co.*, 1909, 1 S.L.T. 478.

<sup>2</sup> *New Mining and Exploring Syndicate, Ltd. v. Chalmers & Hunter*, 1909 S.C. 1390; *Brownrigg Coal Co., Ltd. v. Sneddon*, 1911 S.C. 1064.

<sup>3</sup> *Southern Bowling Club, Ltd. v. Edinburgh Evening News*, 1901, 9 S.L.T. 35.

<sup>4</sup> *MacBean v. The West End Clothiers Co.*, 1918 S.C. 221. See Wilton on Company Law and Practice in Scotland, p. 419.

<sup>5</sup> Wilton, Company Law, p. 525.

<sup>6</sup> 31 & 32 Vict. c. 125, s. 6, subsecs. (4) and (5), and s. 58.

<sup>7</sup> *Teulon v. Seaton*, 1885, 12 R. 1179; *Gray v. Ireland*, 1884, 11 R. 1104; *Macdougall v. Cunningham*, 1901, 9 S.L.T. 100; see also *Cunningham v. Skinner*, 1902, 10 S.L.T. 148, per Lord Young.

<sup>8</sup> *Stevenson v. Lee*, 1886, 13 R. 913.

<sup>9</sup> *Thom v. Andrew*, 1888, 15 R. 780, per Lord Young at p. 783.

<sup>10</sup> *Simpson v. Allan*, 1894, 31 S.L.R. 572; *McCrae v. Bryson*, 1922, S.L.T. 664.

signation may be accepted instead of caution,<sup>1</sup> and caution may be limited.<sup>2</sup> The grounds upon which caution is demanded must be set forth on record or in separate minute.<sup>3</sup>

**324.** An order to find caution may be made to apply to expenses already incurred as well as future expenses, but an interlocutor ordering caution in general terms has been construed to mean only future expenses.<sup>4</sup>

SECTION 8.—CAUTION IN LOOSING ARRESTMENTS.

See ARRESTMENT; BILL CHAMBER.

SECTION 9.—CAUTION BY JUDICIAL FACTORS AND *CURATORS BONIS*.

See JUDICIAL FACTOR; TUTORS AND CURATORS.

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<sup>1</sup> *Harvey v. Farquhar*, 1870, 8 M. 971.

<sup>2</sup> *MacBean v. The West End Clothiers Co.*, 1918 S.C. 221

<sup>3</sup> *Nakeski Cumming v. Gordon's J.F.*, 1923 S.C. 770.

<sup>4</sup> *Douglas v. M'Kinlay*, 1902, 5 F. 260.



# CAUTIONARY OBLIGATIONS.

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## SECTION 1.—DEFINITION.

325. A cautionary obligation is an accessory undertaking to answer for the payment of some debt or the performance of some duty, in case

of the failure of another person, who is himself, in the first instance, liable for such payment or performance.<sup>1</sup> The person who undertakes the accessory obligation is the cautioner, surety, or guarantor; the person to whom the obligation is undertaken is the creditor; and the person whose liability is the foundation of the contract is the principal debtor. Cautionry, in Scotland, corresponds to suretyship in England; and the principles which regulate the contract are practically identical in both countries.<sup>2</sup> The difference between a cautionary obligation and a guarantee is a difference rather in name than in substance, a guarantee being distinguished from a formal cautionary obligation chiefly by the looser epistolary form of the writing.<sup>3</sup> The main principles applicable to this contract, along with many of the terms used in connection therewith, are taken directly from the Roman law.

## SECTION 2.—DISTINCTIVE FEATURES OF CAUTIONARY OBLIGATIONS.

### SUBSECTION (1).—*Accessory Nature of the Contract.*

326. The fundamental characteristic of the contract is that the obligation, on the part of the cautioner or guarantor, is strictly accessory in its nature, being granted by way of security for the fulfilment of some primary obligation on the part of a principal debtor, who, as such, remains liable.<sup>4</sup>

327. From the accessory nature of cautionry, it follows that the existence, present or future, of a lawful principal obligation by a principal debtor to a creditor is a necessary requisite in this species of contract. *Fidejussor obligari non potest ei apud quem reus promittendi obligatus non est.*<sup>5</sup> "There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time; but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed."<sup>6</sup> The principal debt need not be an obligation for the payment of a money claim; it may be for the performance of an act, for the delivery of goods, or for the performance of the duties of an office. In respect of any obligation, in short, which may be lawfully laid on the principal debtor—whether certain or indefinite in amount—a cautioner may intervene. *Omni obligationi fidejussor accedere potest.*<sup>7</sup> Nor does it matter whether the principal obligation has been already contracted at the time the cautioner enters into his obligation, or whether, being then only in contemplation, it is not actually constituted till after that date.<sup>8</sup> All that is necessary is

<sup>1</sup> Cf. Bell, Com. (M'Laren's ed.), i. 364.

<sup>2</sup> Per Lord Eldon in *Grant v. Campbell*, 1818, 6 Dow's App. 239, at p. 252.

<sup>3</sup> Bell, Com. (M'Laren's ed.), i. 388.

<sup>4</sup> Dig. 46, 1; Ersk. Inst. iii. 3, 64; Bell, Prin. s. 245.

<sup>5</sup> Dig. 46, 1, 16.

<sup>6</sup> Per Lord Selborne in *Lakeman v. Mountstephen*, 1874, L.R. 7 H.L. 17, at p. 24.

<sup>7</sup> Dig. 46, 1, 1.

<sup>8</sup> Dig. 46, 1, 6, 2.

that there exist a principal obligation, and such principal obligation may be either previously, or contemporaneously, or subsequently contracted. *Fidejussor et præcedere obligationem et sequi potest.*<sup>1</sup> The law of Scotland on this matter has always been in conformity with the Roman law.

SUBSECTION (2).—*If Principal Obligation Null, the Cautionary Obligation Fails.*

**328.** From the strictly accessory nature of cautionry, it also follows that, where the person for whom the cautioner undertakes to be answerable is not liable at all, the obligation of the cautioner is of no effect. If, for example, the obligation of the principal debtor is void by reason of its inherent illegality, as being *contra bonos mores*; or because it has not been completed, as where the debtor has not subscribed the bond;<sup>2</sup> or because the principal debtor, though formally bound, is in law totally incapable of contracting, as in the case of a pupil or insane person;<sup>3</sup> there can be no liability on the part of the cautioner. So where the cautionary obligation is entered into on the basis of a contemplated liability to be subsequently undertaken by a third party, the emergence of such liability on the part of the third party is a condition precedent to the arising of any liability on the part of the cautioner. If, in such a case, it turns out that the third party, whose prospective liability is made the foundation of the contract, never actually himself becomes liable, the accessory contract necessarily fails, because there is a failure of that which the parties intentionally made the foundation of their contract.<sup>4</sup>

**329.** On the same principle, so soon as the creditor's claim against the principal debtor—though valid at first—comes to an end, as where the debt guaranteed is paid by the principal debtor or is allowed to prescribe,<sup>5</sup> or is novated,<sup>6</sup> the liability of the cautioner is extinguished. In short, as there can be no guarantee of a principal obligation which never comes into existence, so there cannot continue to be a guarantee of a principal obligation which has ceased to exist.

SUBSECTION (3).—*Cautioner may be Liable though Obligation of the Principal Debtor is not Enforceable.*

**330.** It is not, however, necessary in all cases to the validity of the accessory contract that the principal debt should be exigible against the principal debtor by process of law. For the law of Scotland, follow-

<sup>1</sup> Inst. iii. 21, 3.

<sup>2</sup> *Crichton*, 1612, Mor. 2074.

<sup>3</sup> *Stair*, i. 17, 11.

<sup>4</sup> *Mountstephen v. Lakeman*, 1871, L.R. 7 Q.B. 196, per Willes J. at pp. 202, 203; affd. 1874, L.R. 7 H.L. 17.

<sup>5</sup> *Halyburtons v. Graham*, 1735, Mor. 2073. See *infra*, para. 408.

<sup>6</sup> *Commercial Bank of Tasmania v. Jones*, [1893] A.C. 313; Pothier, Obligations (Evans' ed.), i. 236. See *infra*, para. 408.

ing the Roman law,<sup>1</sup> regards it as a sufficient foundation for the cautioner's contract that the principal debtor should be bound by a natural obligation.<sup>2</sup> Under this doctrine, as applied in Scots law, an agreement entered into by a debtor, which purports to create a legal obligation but which, owing to some defect in form or limitation of contractual capacity, is not enforceable by law, may be sufficient to support the obligation of a person who undertakes, as cautioner, to be answerable for its performance. Where, on the one hand, the principal obligation is entirely void, there exists no foundation for an accessory obligation of cautionry; and in such a case a person intervening, professedly as cautioner, can be liable only as having undertaken an independent obligation. On the other hand, where the principal obligation is actually undertaken but turns out to be subject to some flaw which renders it incapable of enforcement in law, a person undertaking to answer for its performance may truly be regarded as a cautioner, and his accessory obligation may be effectual though the primary obligation cannot be enforced.

331. Thus though the deed constituting the principal debt be invalid owing to some informality of execution, as by reason of being subscribed by only one witness, yet the natural obligation of the principal may be sufficient to sustain the accessory liability of a cautioner, at least if the latter knew of the informality.<sup>3</sup> Again, while the personal obligation of a married woman was at common law, in the ordinary case, invalid, and would found diligence neither against her estate nor against her person, her cautioner might be bound.<sup>4</sup> The contract of a minor, who has no curators, being good until set aside on the ground of actual lesion, is a good basis for a cautionary obligation. Further, where a minor, who had a curator, entered into an indenture of apprenticeship without the curator's consent, his cautioner, who had bound himself to indemnify the master for all loss he might sustain by the failure of the minor to implement his engagement, was, on the minor deserting the service, held liable to the master in damages for the minor's breach of contract.<sup>5</sup> The judgment proceeded mainly on the ground that the obligation of the minor, not being wholly void,<sup>6</sup> was sufficient to sustain and render binding the obligation of the cautioner. It was, however, plainly indicated that, on the assumption

<sup>1</sup> Inst. iii. 20, 1.

<sup>2</sup> Stair, i. 17, 10; Ersk. Inst. iii. 3, 64; Bell, Prin. s. 251. In Roman law the term natural obligation had a somewhat special meaning: *Is natura debet quem jure gentium dare oportet, cujus fidem secuti sumus* (Dig. 1, 17, 84, 1).

<sup>3</sup> *N immo v. Brown*, 1700, Mor. 2076; *Johnstoun v. Laird of Romano*, 1680, Mor. 2076; but see *Graham's Creditors v. Grierson*, 1752, Mor. 16902; *Innes v. Commissioners of Supply*, 1728, Mor. 2079.

<sup>4</sup> *Shaw v. Maxwell*, 1623, Mor. 2074; *Buchanan v. Dickie*, 1828, 6 S. 986.

<sup>5</sup> *Stevenson v. Adair*, 1872, 10 M. 919.

<sup>6</sup> It now appears to be settled that a contract by a minor for his apprenticeship or employment, though entered into without his curator's consent, is not void but is presumed to be binding on him (*M'Feetridge v. Stewarts & Lloyds, Ltd.*, 1913 S.C. 773, at p. 783).



that the minor's obligation was void, the cautioner, having undertaken his obligation in the knowledge that the principal obligant was a minor and that his curator had not consented, was, in the event of the minor rejecting his engagement, bound to make good the master's loss.

**332.** The whole doctrine is stated by Erskine, in language which has been frequently approved by the Courts, as follows: "A cautioner can in no case be bound in a higher sense to the creditors than the proper debtor is, for there cannot be more in an accessory obligation than in the principal. Yet he may be more strictly obliged than the proper debtor, as when the cautioner gives the creditor a pledge or a real right in his lands, or when one is cautioner for a debtor who is not himself civilly or fully obliged; for a cautionary obligation may be effectually interposed to an obligation merely natural. Thus a cautioner in an obligation in which the debtor's subscription is not legally attested, or a cautioner for a married woman, or for a minor acting without his curators, is properly obliged, though the debtor himself should get free by pleading the statutory nullity or his own legal incapacity. The reason of this is obvious: *sibi imputet* who interposed in such a case. As the cautioner is presumed to know the debtor's condition, the plain language of his engagement is, that if the debtor take the benefit of the law, he, the cautioner, shall make good the debt."<sup>1</sup> Pothier<sup>2</sup> lays it down that, where the exception is personal to the principal debtor, a surety, on whom no fraud has been practised, is not entitled to plead it and is liable notwithstanding the disability of the principal debtor, but that, where the exception is not founded on any reason personal to the debtor but on the failure of the debt, *e.g.* where the debt is void for illegality, the surety is not liable.

**333.** In England, where the doctrine of natural obligation is not recognised, the Courts have gone quite as far as the Courts in Scotland in the direction of enforcing the promise of a person who, in the knowledge that an obligation by a third party to a creditor is invalid, undertakes, ostensibly as a surety, to secure its fulfilment. This result is reached on the ground either that the surety's knowledge of the circumstances bars him from pleading the incapacity of the supposed principal or that his obligation truly means that, if the supposed principal does not perform what is undertaken, he will himself perform it. Thus where a person undertook, professedly as surety, to answer for the payment of a debt by an infant, incapable of contracting, he was held bound as being substantially the only contracting party.<sup>3</sup> In *Chambers v. Manchester and Milford Rly. Co.*,<sup>4</sup> Blackburn J., while

<sup>1</sup> Ersk. Inst. iii. 3, 64. On this principle a cautioner who has engaged himself in a marriage contract for the husband's performance of his obligations, may be liable to the children of the marriage, although under the marriage contract there is no proper *jus crediti* in favour of the children against their father's estate (*Fotheringham v. Fotheringham of Pourie*, 1734, Mor. 12931; see observations by Lord Dunedin on this case in *Mackinnon's Trs. v. Dunlop*, 1913 S.C. 232, at pp. 238, 239).

<sup>2</sup> Pothier, Obligations (Evans' ed.), i. 237.

<sup>3</sup> *Harris v. Huntbach*, 1747, 1 Burr. 373.

<sup>4</sup> 1864, 5 B. & S. 588.

holding that a bond given by the company (the principal debtor) was void, in respect that the sum borrowed was in excess of the company's borrowing powers, expressed a clear opinion that, although the lender could not enforce payment of the loan from the company, and although the surety, after payment of the loan, could not recover the money paid by him from the company, the surety was nevertheless liable to the lender. Again, in *Yorkshire Railway Waggon Co. v. Maclure*,<sup>1</sup> it was held by Kay J. that three directors of a company, who had guaranteed the repayment of a loan which was, in his judgment, borrowed *ultra vires* of the company and void as against the company,<sup>2</sup> were liable on their guarantee. The principle laid down in these two cases has recently been followed and applied.<sup>3</sup>

### SECTION 3.—CONTRACTS AND OBLIGATIONS ANALOGOUS TO, BUT DISTINCT FROM, CAUTIONRY.

**334.** The essential characteristics of the contract of cautionry are of much practical importance, since they serve, when applied as tests, to mark off other classes of contract, which, though resembling cautionry and occasionally incorrectly included under that term, are nevertheless distinct and are regulated by different principles.

#### SUBSECTION (1).—*Independent Obligations.*

**335.** If a person undertakes an obligation, in the absence of any liability on the part of a third party, or regardless whether or not such a liability exists, or ever will exist, he is not a cautioner, but enters into an independent contract. As has been pointed out, it is not necessary to the constitution of a cautionary obligation that the liability on the part of the principal debtor should actually be in existence at the date of the accessory contract; but if the contract is one of cautionry, it is necessary, when one binds himself for the performance of an obligation which is to be undertaken subsequently by a third party, that, at the date of the transaction, the parties to it clearly contemplate, as the foundation of their present contract, the creation of a primary liability on the part of the third party at a future date. The mere fact that the promise was made for the benefit of a third party, or that the consideration passed to a third party, will not suffice to make the earlier contract one of suretyship, unless it be further shewn that the intention of the contracting parties was that the third party should become actually primarily liable, and that this contemplated future liability on his part was the basis of the earlier contract.<sup>4</sup> So an obligation to a creditor in

<sup>1</sup> 1881, 19 Ch. Div. 478.

<sup>2</sup> On appeal, 1882, 21 Ch. Div. 309, it was held that the transaction was not *ultra vires* of the company.

<sup>3</sup> *Garrard v. Jones*, [1915] 1 Ch. 616, where cases in which the principal debt was void for illegality, e.g. *Swan v. Bank of Scotland*, 1836, 10 Bligh, N.S., 627, were distinguished.

<sup>4</sup> *Mountstephen v. Lakeman*, 1871, L.R. 7 Q.B. 196; affd. 1874, L.R. 7 H.L. 17.

these terms, "I will see the above account settled," was held to be a primary, and not a cautionary, obligation, because it appeared that the obligant did not contemplate the continued liability of the original debtor as the basis of his promise.<sup>1</sup>

**336.** It is often, indeed, difficult to determine whether there was a promise to pay whether a third person should be liable or not—in which case it is an original and independent obligation; or whether the promise was to pay only in the second instance, and in the event of the failure a third person, who was, or was about to become, primarily liable—in which case it is a cautionary obligation. Where, for example, A. induces a tradesman to deliver goods to B. by promising to see the price paid, the nature of A.'s liability depends upon whether the tradesman as a matter of fact gave credit to A. or to B. If the credit was given entirely to A., then the goods, though delivered to B., must be considered as sold to A., who accordingly is liable as a principal; if, on the other hand, the tradesman trusted primarily to the credit of B., then the goods must be considered as sold to him, in which case A. is liable only in the second instance, and as a surety for the price.<sup>2</sup> In settling to which of the two credit was really given, all the circumstances of the transaction are to be taken into account;<sup>3</sup> and it is an important, though not a conclusive, element in this inquiry, to determine which of them was debited with the debt in the tradesman's books.<sup>4</sup> The law on this subject was succinctly stated *per curiam* in the leading English case, *Birkmyr v. Darnell*<sup>5</sup>—a statement approved and followed in *Stevenson's Tr. v. Campbell & Son*<sup>6</sup>—as follows: "If two come to a shop, and one buys, and the other, to gain him credit, promises the seller, 'If he does not pay you, I will,' this is a collateral undertaking and void without writing by the Statute of Frauds. But if he says, 'Let him have the goods; I will be your paymaster,' or 'I will see you paid,' this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant."

#### SUBSECTION (2).—*Delegation.*

**337.** It is an essential feature in a cautionary obligation, directly resulting from its accessory character, that the cautioner, by undertaking his obligation, does not exonerate the principal debtor, or extinguish the principal debt. In the words of Erskine, the obligation of the cautioner is "barely adjoined to the debtor's obligation without extin-

<sup>1</sup> *Morrison v. Harkness*, 1870, 9 M. 35; see also *Woodside v. Cuthbertson*, 1848, 10 D. 604; *Mollison's Trs. v. Crawford*, 1851, 13 D. 1075; *Aitken & Co. v. Pyper*, 1900, 38 S.L.R. 74.

<sup>2</sup> *Blackwood v. Forbes*, 1848, 10 D. 920; *Grant v. Fenton*, 1853, 15 D. 424.

<sup>3</sup> *Stevenson's Tr. v. Campbell & Son*, 1896, 23 R. 711.

<sup>4</sup> *Keate v. Temple*, 1797, 1 B. & P. 158; *Storr v. Scott*, 1833, 6 C. & P. 241; *Croft v. Smallwood*, 1793, 1 Esp. 121.

<sup>5</sup> 1 *Smith's Leading Cases* (12th ed.), p. 335.

<sup>6</sup> 1896, 23 R. 711.



guishing it.”<sup>1</sup> It is this feature which marks the distinction between a cautionary obligation and novation, or, more properly, delegation. Cautionry is the acceptance by the creditor of an additional debtor for, and along with, the original debtor; delegation is the acceptance by the creditor of a new debtor for, and in lieu of, the original debtor. The distinction is accurately marked in Roman law by the terms *adpromissio* and *expromissio*. An *adpromissor* was a proper cautioner; an *expromissor* was a new debtor, substituted for an old debtor. Where the original debt is discharged or destroyed by the new agreement, the transaction is one of delegation,<sup>2</sup> and there can be no guarantee of an obligation which has ceased to exist. This is so even where the substituted obligation is granted by the same person.<sup>3</sup> Even if the third party, whose obligation has been accepted by the creditor in room and discharge of the obligation of the original debtor, has an action of relief against the former debtor, he is not a cautioner *quoad* the creditor.<sup>4</sup>

**338.** Delegation, however, is not presumed; and *in dubio* the new obligation is accounted merely corroborative of the old. Where there is an existing debt for which a person is liable, and a third party undertakes to be answerable for it, it is often a difficult question of fact whether the creditor, by accepting the obligation of the new debtor, has relinquished his claim on the party originally liable. But the principle of law is clear that, unless the liability of the third party, who was originally liable to the creditor, continues, the undertaking of the new debtor is not a cautionary obligation.<sup>5</sup> So in England, where the obligation of the new debtor has the effect of releasing the original debtor from his liability, the undertaking of the new debtor is not a promise to answer for the debt, default, or miscarriage of another within the meaning of s. 4 of the Statute of Frauds.<sup>6</sup>

#### SUBSECTION (3).—*Contracts of Indemnity.*

**339.** It is essential in cautionry that the cautioner's undertaking be granted to, or in favour of, the creditor in the primary obligation, and that the liability undertaken be dependent on the default of a third person, the principal debtor.<sup>7</sup> There is a plain distinction between a

<sup>1</sup> Ersk. Inst. iii. 3, 61. Compare the definition in Roman law: “*Ut principalis debitor nihilominus maneat obligatus*,” Dig. 46, 1.

<sup>2</sup> As to distinction between novation and conjunct debt, see *Bradford Old Bank v. Sutcliffe*, [1918] 2 K.B. 833 at 849.

<sup>3</sup> *Jackson v. MacDiarmid*, 1892, 19 R. 528.

<sup>4</sup> Stair, i. 17, 3. A right of relief may exist quite independently of any cautionary relation, and the mere fact that one of two obligants has a right of relief against the other does not infer that he is a cautioner (*Union Bank v. M. Murray*, 1870, 7 S.L.R. 596, per the Lord President; cf. *Roughead v. White*, 1913 S.C. 162).

<sup>5</sup> *Morrison v. Harkness*, 1870, 9 M. 35.

<sup>6</sup> *Ansley v. Warden*, 1804, 1 B. & P. N.R. 124; *Goodman v. Chase*, 1818, 1 B. & Ald. 297; *Lane v. Burghart*, 1841, 1 Q.B. 933, 937.

<sup>7</sup> Pothier on Obligations, s. 394.



promise to pay a creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter, into a contract of liability indemnified against that liability, independently of the question whether a third person makes default.<sup>1</sup> A promise made, not to the creditor, but to the debtor, in an obligation, the purpose being to induce him to undertake the liability, differs, in essential features, from a guarantee. Thus where the defender, in a so-called letter of guarantee, undertook that if the pursuer got certain shares subscribed for, he would make good any loss which the pursuer might incur by so doing, the Court held that the contract did not partake in any degree of the nature of a cautionary obligation, but was an independent obligation, and, therefore, that the defender was not entitled to any of the equities of a cautioner.<sup>2</sup> So in England it is settled that a promise of indemnity, when not made to the person to whom another is already, or is to become, answerable, but to a person who, in consideration of such promise, undertakes a liability, is not a guarantee within the Statute of Frauds.<sup>3</sup>

SUBSECTION (4).—*Obligations undertaken Primarily in the  
Obligant's own Behoof.*

**310.** A cautioner undertakes to be answerable for another's debt for which he has no liability except such as attaches by reason of his promise. In the words of Lord Stair, "caution is a promise or contract of any, not for himself, but for another."<sup>4</sup> Where, therefore, there exists a liability on the part of the promiser in connection with the debt for which he becomes responsible, distinct from the liability of the third party for whom he intervenes, or, in other words, where the promiser's liability is founded on a consideration proper to himself and distinct from the cause of demand which the creditor has against the original debtor, his obligation is not cautionary.<sup>5</sup> Thus where a person signed *ex facie* as cautioner a bond of cash credit to be operated on by a firm, of which he was not a partner, under an arrangement that the drafts in the name of the firm upon the cash credit were to be applied in clearing off an old bond in which he was an obligant, it was held that

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<sup>1</sup> Per Davey L.J. in *Guild & Co. v. Conrad*, [1894] 2 Q.B. 885, at p. 896. While a right of indemnity generally arises from contract, express or implied, it exists wherever the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other (per Lord Wrenbury in *Eastern Shipping Co. v. Quah Beng Kee*, [1924] A.C. 177, at p. 182).

<sup>2</sup> *Milne v. Kidd*, 1869, 8 M. 250 *vide*, per Lord President Inglis.

<sup>3</sup> *Hargreaves v. Parsons*, 1844, 13 M. & W. 561; *Reader v. Kingham*, 1862, 13 C.B. N.S. 344; *In re Hoyle*, [1893] 1 Ch. 84; *Guild & Co. v. Conrad*, [1894] 2 Q.B. 885, in which the distinction between contracts of guarantee and contracts of indemnity was considered by the Court of Appeal.

<sup>4</sup> Stair, i. 17, 3.

<sup>5</sup> Lord McLaren's note on s. 6 of the Mercantile Law Amendment Act (Bell, Com. (M'Laren's ed.), i. 407).

he had not the rights of a cautioner.<sup>1</sup> "It is," observed Lord Fullerton, "not enough that *ex facie* of the bond he appears to be a cautioner, if it be shewn that in substance he had a higher interest." So, in England, if the object of the intervening party is to relieve himself or his property from some pre-existing liability, his undertaking, though it takes the form of a promise to pay the debt of another, is not a guarantee, but an independent obligation.<sup>2</sup>

341. The question whether there exists, on the part of the person intervening, such an independent liability as would make it true to say that he intervened for his own behoof and not as a cautioner, is a question of fact to be determined on a consideration of the whole circumstances. On this principle, where an obligation to pay the debt of another arises incidentally to some larger or main contract antecedently made between the party liable to that obligation and the creditor, the obligation is not a guarantee. Thus the contract of a *del credere* agent, although it incidentally involves liability to pay the debt of another, is not within s. 4 of the Statute of Frauds.<sup>3</sup> Similarly a contract between a firm of stockbrokers and a person who was to introduce clients to them that he was to receive half the commission earned on transactions with such clients and bear half of any loss which might be incurred on such transactions is not within the statute.<sup>4</sup> But the mere fact that the motive of the intervening party was the protection of what he supposed to be his own interest will not prevent his obligation from being a guarantee, if it was not undertaken in performance of an obligation under any antecedent contract or in respect of any liability under which he already lay.<sup>5</sup>

342. A person who gives a mandate to one party to lend money, or give credit, to a third party is regarded as a cautioner by the institutional writers.<sup>6</sup> Other authorities, however, hold that, since there intervenes between the so-called cautioner and the creditor a regular contract of mandate, the mandant is bound *ex causâ mandati* in an independent, and not in an accessory, contract. The question seems largely to depend upon the circumstances of the particular case.<sup>7</sup> On the one hand, where the mandate is to lend money, or give credit, to a third party, exclusively for behoof of the third party, who, on receipt of the money or goods, becomes himself primarily liable to the creditor for payment, the mandant being secondarily liable, the position is indistinguishable from that of a cautioner who binds himself for the performance of an obligation to be

<sup>1</sup> *Erskine v. Cormack*, 1842, 4 D. 1478, *vide per* Lord Fullerton at p. 1481; *Union Bank v. M'Murray*, 1870, 7 S.L.R. 596; 1873, 10 S.L.R. 319.

<sup>2</sup> *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K.B. 778, at pp. 786, 793; *Fitzgerald v. Dressler*, 1859, 7 C.B. N.S. 374.

<sup>3</sup> *Couturier v. Hastie*, 1852, 8 Ex. 40. As to obligations and liability of a *del credere* agent see AGENCY, Vol. I. 580-586.

<sup>4</sup> *Sutton v. Grey*, [1894] 1 Q.B. 285.

<sup>6</sup> Stair, i. 17, 3; Ersk. Inst. iii. 3, 61.

<sup>5</sup> *Davys v. Buswell*, [1913] 2 K.B. 47.

<sup>7</sup> Pothier on Obligations, s. 446; Lord McLaren's Note on Mercantile Law Amendment Act, Bell, Com. i. 408.

subsequently undertaken by a third party. On the other hand, where the mandate is given for behoof of the mandant himself, the contract strictly belongs to the category of mandate.<sup>1</sup> See MANDATE.

#### SUBSECTION (5).—*Insurance.*

**343.** The risk of default by a debtor can be insured against. Contracts of insurance—generally known as guarantee policies—whereby an insurer engages to pay the loss incurred by the insured in respect of the default of his debtor, are to be distinguished from ordinary contracts of guarantee. In a contract of insurance the insurer, in return for the payment of a certain premium fixed to remunerate him for the risk undertaken, contracts to pay a sum measured in a certain way, upon the happening of specified contingencies, *e.g.* the default of a debtor. The obligation undertaken by the insurer may be to pay a sum different from that which the defaulting debtor was liable to pay, and may depend on contingencies of time and event which had no place in the debtor's obligation. In the ordinary case, it is undertaken upon the application of the insured person and upon statements or representations made by him affecting the nature and extent of the risk. Such an obligation is, in its form and in respect of the basis upon which the parties contract, an independent obligation; and the mere fact that it may result in a liability to pay the debt of another does not make it an accessory obligation of guarantee. Thus where, in a policy of insurance issued to the holder of a deposit receipt of a bank, an insurance company "guaranteed" payment of the sum deposited, on the terms that, if the bank made default for a specified period in repayment, the insurers would pay to the insured the amount of the deposit, Lord M'Laren said: "We cannot regard the obligation of the insurance company in the light of a guarantee. It is called a policy of insurance, and that is its true nature, and under it the insurance company is not substituted as a new debtor in place of the bank, but undertakes an independent obligation to indemnify the pursuer against a failure to pay on the part of the bank from whatever cause."<sup>2</sup> So Lord Esher, speaking of a policy couched in somewhat similar terms, observed: "The policy is not a guarantee that the bank will be able to pay; it is a positive contract that if the bank does not pay a certain amount on a fixed day the insurance company will pay that amount."<sup>3</sup>

**344.** In determining whether a particular contract is to be deemed to be a contract of insurance or a contract of guarantee, the form of the contract, the way in which it has been effected, the debtor's knowledge, or

<sup>1</sup> As to the distinction in the mode of proof in the two cases, *vide* Dickson on Evidence, s. 572; Tait on Evidence, ss. 300, 302; *Paisley v. Raltray*, 13th January 1779, F.C.

<sup>2</sup> *Laird v. Securities Insurance Co., Ltd.*, 1895, 22 R. 452, at p. 459. The obligation of the insurance company was held not to be affected by the bank being freed under a scheme of arrangement from all its obligations. Cf. *Young v. Trustee, Assets, and Investment Insurance Co., Ltd.*, 1893, 21 R. 222.

<sup>3</sup> *Dane v. The Mortgage Insurance Corporation*, [1894] 1 Q.B. 54, at p. 61.



want of knowledge, of the transaction, and the language of the written instrument are elements to be considered; but the true nature of the contract is to be ascertained upon an examination of its effects rather than upon a consideration of its form or other incidental matters, or the use of the words "insurance" or "guarantee" in the document.<sup>1</sup> The circumstance that the obligation is undertaken for reward does not prevent it from being, in the full sense, a guarantee.<sup>2</sup> Again, although the debtor has no knowledge that, in the event of his default, another has undertaken to be responsible to the creditor for payment of the whole or part of the debt, the undertaking of that other may none the less be a guarantee.<sup>3</sup>

**345.** A guarantee policy, if it be truly a contract of insurance, is, like other contracts of insurance, a contract *uberrimæ fidei*, and if full disclosure is not made of all matters material to the risk which are within the knowledge of the insured, the insurers are not bound by the contract.<sup>4</sup> On the other hand, in a guarantee, the cautioner is not ordinarily entitled, without inquiry, to obtain from the creditor a full disclosure of all the circumstances and dealings between the principal debtor and the creditor, even though these were such as would have influenced a reasonable man to decline to become cautioner.<sup>5</sup> A contract may have the attributes of a contract of insurance in so far as the relationship of the parties to each other and the duty of *uberrima fides* are concerned, and at the same time the attributes of a contract of guarantee in a question as to rights against third parties.<sup>6</sup>

#### SUBSECTION (6).—*Representations as to Credit of Third Party.*

**346.** A representation as to the solvency, credit, or trustworthiness of a third party which induces another to contract with the third party may give rise to liability for loss which that other suffers by reason of his having acted on the representation. It may thus, in the result, have much the same effect as a guarantee. (1) The liability incurred in

<sup>1</sup> *Liverpool Mortgage Insurance Co.*, [1914] 2 Ch. 617, per Buckley L.J. at p. 631; *Seaton v. Heath*, [1899] 1 Q.B. 782, per Romer L.J. at p. 792. Cases in which the contract was held to be one of insurance are: *Liverpool Mortgage Insurance Co.*, *supra*; *Dane v. The Mortgage Insurance Corporation*, *supra*; *Finlay v. Mexican Corporation*, [1897] 1 Q.B. 517; *Shaw v. Royce*, [1911] 1 Ch. 138. In *Denton's Estate Licences Insurance Corporation and Guarantee Fund*, [1904] 2 Ch. 178, the contract was held to be a guarantee and not an insurance.

<sup>2</sup> *Imperial Bank v. London and St. Katherine Docks Co.*, 1877, 5 Ch. D. 195, per Jessel M.R. at p. 200.

<sup>3</sup> *Fides ubere pro alio potest quisque, etiamsi promissor ignoret* (Dig. 46, 1, 30).

<sup>4</sup> *Seaton v. Heath*, [1899] 1 Q.B. 782. The decision of the Court of Appeal on this point was not considered in the House of Lords (*Seaton v. Burnard*, [1900] A.C. 135). The judgment of the House of Lords proceeded on the ground that an insurer of a surety's solvency is not entitled to be informed of all the circumstances and conditions of the principal debt.

<sup>5</sup> See *infra*, para. 364, *et seq.*

<sup>6</sup> *Denton's Estate Licences Insurance Corporation and Guarantee Fund*, [1904] 2 Ch. 178; *Shaw v. Royce*, [1911] 1 Ch. 138.



respect of such a representation may arise from the fact that the representation was false and was made in the knowledge of its falsehood or recklessly without belief in its truth. In this case the liability is based on fraud. The person deceived, if he has suffered loss, can, in an action for false and fraudulent misrepresentation, recover damages for that loss. (2) Where there exists between the persons a fiduciary or other special relation which imposes on the one a duty to take care that representations made by him to the other are accurate, an action for negligence and breach of duty may lie in respect of a misrepresentation although it was not fraudulent.<sup>1</sup> In cases of this class the innocent misrepresentation is not the cause of action, but the evidence of the negligence which is the cause of action.<sup>2</sup> (3) Again, a representation which is not fraudulent may give rise to liability through the operation of the doctrine of personal bar. A representation which, by the operation of personal bar, a man is compelled by law to make good is, for practical purposes, equivalent to a contractual obligation.<sup>3</sup> (4) Further, a statement as to the credit of another may be couched in terms which render it directly binding as a contract. It not infrequently happens that the language used is capable of being construed either as a representation or as a contract.<sup>4</sup> In such a case the words will import a direct contract of guarantee if it appear that they were so intended and understood.<sup>5</sup> It is only representations as to some state of facts alleged to be at the time actually in existence that furnish ground for the application of the doctrine of personal bar. Where the statement relates to matters *de futuro* it, if binding at all, can be binding only as a contract.<sup>6</sup>

**347.** A representation as to a trader's credit refers only (unless otherwise expressed) to the trader's credit at the time the representation is made.<sup>7</sup> The representation must be made with the intention that it should be acted on by the injured party. Where a confidential representation is made as to a trader's credit and there is nothing to shew that the person making the representation contemplated that it would be communicated to any person other than the individual to whom it is addressed, it has been held that the representation is personal to the individual to whom it is addressed and will not found an action for damages by another person relying upon it.<sup>8</sup> But it is not a necessary condition of liability that the misrepresentation should have been made directly to the person who is damnified. If the person making the state-

<sup>1</sup> *Nocton v. Lord Ashburton*, [1914] A.C. 932; *Robinson v. National Bank of Scotland*, 1916 S.C. (H.L.) 154, per Lord Haldane at p. 157.

<sup>2</sup> *Banbury v. Bank of Montreal*, [1918] A.C. 627, per Lord Wrenbury at p. 713.

<sup>3</sup> *Pollock on Contract* (9th ed.), p. 569.

<sup>4</sup> *Brownlie v. Miller*, 1880, 7 R. (H.L.) 66, per Lord Blackburn at p. 81; *Clydesdale Bank, Ltd. v. Paton*, 1896, 23 R. (H.L.) 22, per Lord Herschell at p. 29.

<sup>5</sup> *Wallace v. Gibson*, 1895, 22 R. (H.L.) 56, at p. 65.

<sup>6</sup> *Maddison v. Alderson*, 1883, 8 App. Cas. 467, per Lord Selborne at p. 472.

<sup>7</sup> *Salton & Co. v. Clydesdale Bank, Ltd.*, 1898, 1 F. 110.

<sup>8</sup> *Ibid.*; Bell, *Com.* (7th ed.), i. 392.

ment was aware that it was to be communicated to persons other than the individual to whom it was made for the purpose of influencing them to act upon it, he is responsible to them for loss suffered by reason of their having so acted.<sup>1</sup> Thus, in *Robinson v. National Bank of Scotland*,<sup>2</sup> an action for false and fraudulent misrepresentation was plainly deemed by the House of Lords to be maintainable in respect of statements as to the credit of a third party contained in a letter which was not addressed to or seen by the person bringing the action, it being proved that the letter was written with the intention of influencing him to act upon it, and that he, being informed of its purport in pursuance of the writer's intention, did act on it in the manner contemplated by the writer.

#### SECTION 4.—CLASSIFICATION OF CAUTIONARY OBLIGATIONS.

**348.** Cases in which the relation of principal and cautioner subsists have been classified<sup>3</sup> under three heads: (1) Obligations in which the creditor secured is a party to the contract; (2) obligations in which the relation of principal and cautioner is constituted by an agreement between the obligants to which the creditor is not a party; and (3) obligations in which without any express contract of cautionry there is a primary and secondary liability on the part of two or more persons for one and the same debt.

##### SUBSECTION (1).—*Obligations to which the Creditor is a Party.*

**349.** In cautionary contracts, in the strict sense of the term, there is an agreement to constitute, for a particular purpose, the relation of principal debtor and cautioner, to which agreement the creditor secured is a party. In a contract of this class the principles of cautionry are from the first fully applicable to the relations of the different parties to the contract. The cautioner-obligants may either be bound simply and expressly as cautioners for the principal debtor, or they may be bound along with him as co-principals and full debtors. Where the cautioners are bound simply as cautioners, they are "proper" cautioners, and are, in the first instance, on the default of the principal debtor, liable to the creditor each only for his *pro rata* share of the debt, though in the event of the bankruptcy or insolvency of one of their number the others must make up his share. Where the cautioners are bound along with the principal debtor as co-principals and full debtors, or in a joint and several obligation, they are "improper" cautioners, and the creditor, on the arrival of the term of payment, has instant recourse against any one of the obligants whom he may select, or against the several obligants in such proportions as he pleases, for the whole amount of

<sup>1</sup> *Swift v. Winterbotham*, 1873, L.R. 8 Q.B. 244; *Peek v. Gurney*, 1873, L.R. 6 H.L. 377, per Lord Cairns at p. 413; *Balfour, Junor & Co. v. Russell*, 8th March 1815, F.C.

<sup>2</sup> 1916 S.C. (H.L.) 154.

<sup>3</sup> *Duncan Fox & Co. v. North and South Wales Bank*, 1880, 6 App. Cas. 1, per Lord Selborne at p. 11.

the debt.<sup>1</sup> While in this latter class of cases the creditor can, in accordance with the terms of the obligation, at once enforce his debt against any of the co-obligants, the fact that the cautioner-obligants are bound as co-principals in no way affects their right of total relief against the obligant who is the real principal debtor, or their claims for contribution and mutual relief among themselves.<sup>2</sup> Further, as the creditor is from the first a party to, or has knowledge of, the relation subsisting between the cautioner-obligants and the principal debtor, he is bound in all his dealings with the principal debtor to have regard to the rights of the cautioner-obligants, and if by his actings he prejudices these rights, he does so at his peril.<sup>3</sup>

**350.** In many cases the existence of a cautionary relation between the persons bound in a joint and several obligation is made sufficiently clear by the terms of the obligation undertaken to the creditor, as, for example, where certain of the obligants are expressly described as cautioners; where there is a clause of relief in the bond; or where the obligation is in the form of a cash-credit bond. In these and all other cases where it clearly appears from the nature of the transaction as set forth in the deed that certain of the obligants, though subscribing as principals, are merely cautioners—though this be not formally stated—these obligants are entitled, as from the date of the contract, to the rights of cautioners, not only in a question with the principal debtor, but also in a question with the creditor. The law, in short, in determining the relation of the parties and the equitable rights arising from that relation, looks to the substance and real nature of the transaction and not merely to its form.<sup>4</sup>

#### SUBSECTION (2).—*Obligations to which Creditor is not a Party.*

**351.** The relation of principal debtor and cautioner may be, and frequently is, constituted by agreement between the principal debtor and cautioner only, the creditor being a stranger to the agreement. In such a case, though the relation of principal debtor and cautioner subsists between the obligants, the rights of the creditor, so long as he has no knowledge of that relation, are determined wholly by the quality of the obligation undertaken to him in the instrument constituting the debt, and he is subject to none of the responsibilities incident to the position of a creditor in a cautionary obligation. Thus if the obligants are bound in a joint and several obligation they are, as regards the creditor, merely *correi debendi*. At the same time the fact that the co-obligants are

<sup>1</sup> Bell, Prin. s. 247; *Wilson v. Tait*, 1840, 1 Rob. App. 137, per the Lord Chancellor; *Morton's Trs. v. Robertson's Judicial Factor*, 1892, 20 R. 72.

<sup>2</sup> *Mackenzie v. Macartney*, 1831, 5 W. & S. 504.

<sup>3</sup> As to the special rights or equities of cautioners in a question with the creditor, *vide infra*, para. 389, *et seq.*

<sup>4</sup> *Mackenzie v. Macartney*, 1831, 5 W. & S. 504, per the Lord Chancellor at p. 511; *Paterson v. Bonar*, 1844, 6 D. 987; *Scottish Provincial Assurance Co. v. Pringle*, 1858, 20 D. 465.



*correi* in relation to the creditor does not impair their respective rights *inter se*—rights based upon equity and existing in virtue of the relation of principal and cautioner subsisting between them under the mutual agreement entered into among themselves.<sup>1</sup> “It is familiar law that a person may be truly a cautioner although with regard to the creditor he is in the position of a principal.”<sup>2</sup> Even where the obligants are bound to the creditor in a formal bond, it is competent, with a view to determining questions of relief, to prove by parole what is the true relation between the signatories to the bond under the mutual agreement entered into among themselves; and when it is proved that the relation of principal debtor and cautioner does truly exist between persons *ex facie* bound *in solidum* as principals, then, if any one of those who are in fact cautioner-debtors is called upon by the creditor to pay any part of the debt, he is entitled to full relief from the obligant, who is in fact principal debtor; and as between the obligants who are merely cautioners, if one pays more than his share of the debt of the principal, he is entitled to claim a rateable contribution from the others.<sup>3</sup>

352. As regards the creditor, so long as he continues a stranger to, and has no knowledge of, the principal-and-cautioner relation subsisting between his debtors, there is no contract of cautionry at all. From the moment, however, that the true mutual relation of his obligants is brought to the creditor’s knowledge, he, while retaining unimpaired his right to enforce payment of the debt,<sup>4</sup> forthwith becomes liable in the duties and responsibilities of a creditor in a cautionary obligation, and is bound in all his subsequent actings in respect of the debt to regard and protect the rights and interests of the cautioner-obligants.<sup>5</sup> These new duties on the part of the creditor towards the cautioner-obligants and the corresponding rights of these obligants as against the creditor do not depend on contract; they are based solely on principles of equity—an equity arising out of the creditor’s knowledge of the cautionary relation subsisting between his debtors. Obligants who *ex facie* of the instrument are bound jointly and severally may, by notice to the creditor of a subsisting cautionary relation among his debtors, acquire the rights of cautioners in a question with him whether the notice was given at the time of the contract with the creditor or at some later date, and whether the cautionary relation between the obligants existed at the date of the contract with the creditor or came into existence after the date of that contract in virtue of an arrangement between the obligants.<sup>6</sup>

<sup>1</sup> *Morton’s Trs. v. Robertson’s Judicial Factor*, 1892, 20 R. 72, per Lord M’Laren.

<sup>2</sup> *Thow’s Tr. v. Young*, 1910 S.C. 588, per Lord Pres. Dunedin at p. 596.

<sup>3</sup> *Ward v. New Zealand Bank*, 1883, 8 App. Cas. 755; *Morton’s Trs. v. Robertson’s Judicial Factor*, *supra*.

<sup>4</sup> *Ewart v. Latta*, 1865, 3 M. (H.L.) 36.

<sup>5</sup> *Duncan Fox & Co. v. North and South Wales Bank*, 1880, 6 App. Cas. 1, per Lord Selborne; *Oriental Financial Corporation v. Overend, Gurney & Co.*, 1874, L.R. 7 H.L. 348; *Greenough v. M’Clelland*, 1860, 30 L.J. Q.B. 15.

<sup>6</sup> *Rouse v. Bradford Banking Co.*, [1894] A.C. 586.



SUBSECTION (3).—*Primary and Secondary Liability for the same Debt.*

**353.** Again, there is a class of cases in which, though there is no intention to undertake an obligation of cautionry, there nevertheless exists a primary and secondary obligation on the part of two or more persons for one and the same debt, the debt being, as between the two, that of one of these persons only and not equally of both, with the result that the relations of the parties are in great measure regulated by the principles which govern cautionary contracts. The relation of the partners in a firm to the firm is an example of this, since a contract of partnership implies a guarantee by each individual partner to third parties of all engagements legally undertaken in the social name, so that the individual partners are in the position of sureties for the firm.<sup>1</sup> Thus a partner retiring with the ordinary provision for indemnity has the rights of a surety in a question with a creditor of the old firm having notice of that provision.<sup>2</sup> The most important example, however, of such a primary and secondary liability for one debt is found in bills of exchange. The relation between the successive parties to a bill resembles in many respects that between a principal debtor and a cautioner.<sup>3</sup> Thus in a bill accepted and endorsed for value, the acceptor is in a position very similar to that of a principal debtor in a cautionary contract, while all the other parties, both the drawer and the indorsers, are, like cautioners, liable on his default for the payment of the bill to the holder—the creditor in the obligation. So, as between the drawer and indorsers, each subsequent party occupies a position closely resembling that of a cautioner to the holder of the bill for each of the prior parties to the bill. An accommodation party to a bill of exchange, known by the holder to be such, is in every respect in the position of a cautioner for the person accommodated.<sup>4</sup> Hence many of the most valuable illustrations of the application of the principles of cautionry are found in cases dealing with bills. It is to be noted that, while the motive or object of the party who incurs the obligation on a bill may be to guarantee a third person, and that may be known to the person who gives value for the bill, the obligation is by the custom of merchants on the bill.<sup>5</sup>

## SECTION 5.—CONSTITUTION OF CONTRACT.

SUBSECTION (1).—*Whether Writing Essential?*

**354.** Lord Stair lays it down that “caution is interposed any way by which consent is truly given”;<sup>6</sup> and Erskine distinguishes between

<sup>1</sup> Bell, Prin. s. 351 ; Bell, Com. ii. 506.

<sup>2</sup> Rouse, *supra*.

<sup>3</sup> *Walker's Trs. v. M'Kinlay*, 1880, 7 R. (H.L.) 85 ; *Duncan Fox & Co. v. North and South Wales Bank*, 1880, 6 App. Cas. 1.

<sup>4</sup> *Oriental Financial Corporation v. Overend, Gurney & Co.*, 1874, L.R. 7 H.L. 348.

<sup>5</sup> *Walker's Trs. v. M'Kinlay*, 1880, 7 R. (H.L.) 85, per Lord Blackburn at p. 89.

<sup>6</sup> Stair, Inst. i. 17, 3.

contracts such as cautionry and "bargains where writing is essential to their constitution, as in those relating to land."<sup>1</sup> At common law, however, from an early period, a contract of cautionry or guarantee could in the ordinary case be proved only by writing.<sup>2</sup> But it appears to be the better opinion that, by the common law of Scotland, cautionry or guarantee is not a *literarum obligatio*, but a consensual contract to the constitution of which writing is not essential.<sup>3</sup> By s. 6 of the Mercantile Law Amendment Act, 1856, it is provided that cautionary obligations or guarantees "shall be in writing, and shall be subscribed by the person undertaking such guarantee or cautionary obligation . . . otherwise the same shall have no effect." The question whether, under this statutory provision, writing and subscription are made essential to the constitution of a cautionary obligation or are merely required *in modum probationis*, has not been judicially determined.<sup>4</sup>

#### SUBSECTION (2).—*Capacity to Contract.*

**355.** Capacity to enter on a cautionary contract is in the main regulated by the same rules as capacity to contract other personal obligations; but in cautionry, for obvious reasons, these rules are applied with greater strictness than in the generality of personal obligations.

**356.** At common law, a cautionary obligation granted by a married woman was not enforceable against her or against her separate estate, unless it was shewn to have been granted in the administration of her separate estate or to have been *in rem versum* or to come within one of the other recognised exceptions to the general rule that the personal obligation of a married woman was invalid.<sup>5</sup> The fact that she had separate estate and that her husband consented to her granting the obligation did not render it valid.<sup>6</sup> The Married Women's Property Act, 1881,<sup>7</sup> did not affect the protection afforded by the common law to married women in this respect.<sup>8</sup> But under the Married Women's Property Act, 1920,<sup>9</sup> which applies to all married women whether married before or after the date of the Act, a married woman is now capable of undertaking a cautionary obligation and of being sued thereon as if she were not married.

**357.** Where a cautionary obligation has been undertaken by a minor who has no curators, or who has acted with the consent of his curators, and the minor subsequently seeks within four years after he has reached

<sup>1</sup> Ersk. Inst. iv. 2, 30.

<sup>2</sup> Ersk. Inst. iv. 2, 20; Bell, Com. i. 388.

<sup>3</sup> Bell, Prin. s. 18; Dickson on Evidence, s. 597. Cases illustrating the fluctuation of judicial opinion and decision on this matter are cited by Lord Moncreiff in *Paterson v. Paterson*, 1897, 25 R. 144, at p. 167.

<sup>4</sup> *Vide infra*, para. 371, *et seq.*

<sup>5</sup> *Lennox v. Auchincloss*, 1821, 1 S. 22 (N.E. 19); *Biggart v. City of Glasgow Bank*, 1879, 6 R. 470, per Lord Pres. Inglis at p. 481; *Galbraith v. Provident Bank, Ltd.*, 1900, 2 F. 1148; *Jackson v. MacDiarmid*, 1892, 19 R. 528.

<sup>6</sup> *Lennox v. Auchincloss*, 1821, 1 S. 22 (N.E. 19).

<sup>7</sup> 44 & 45 Vict. c. 21.

<sup>8</sup> *M'Lean v. Angus Bros.*, 1887, 14 R. 448.

<sup>9</sup> 10 & 11 Geo. V. c. 64, s. 1 (3).

majority to reduce it, upon the ground of minority combined with lesion, a strong presumption of law to aid the proof of lesion arises from the fact that the obligation was a cautionary one.<sup>1</sup>

**358.** A partner of a firm has not implied authority to bind the firm by adhibiting the firm signature to a guarantee of the debt of a third party, unless it is shewn that the granting of guarantees is necessary for the purpose of carrying on the business of the firm in the ordinary way, as, for example, in the case of a guarantee association.<sup>2</sup> Even where the matter in which the debt was incurred by the third party is closely related to the firm's business, a partner has no implied authority to bind his firm in a guarantee of the debt due by the third party.<sup>3</sup> Although a partner, who adhibits the firm-name to a cautionary obligation outwith the scope of the business of the firm, does not bind the firm, he binds himself.<sup>4</sup> Authority to bind the firm by a guarantee may, of course, be conferred on a partner by agreement between the partners; and such authority may be inferred if it be proved that it was the usage of that particular firm, or the general custom of other firms engaged in the like business, to grant such guarantees.<sup>5</sup> Again, a firm is bound by a guarantee given by one of the partners if there be evidence that the firm ratified the contract of which the guarantee was part.<sup>6</sup>

**359.** A company is not bound by a guarantee granted by its directors, managers, or other officials, unless their power so to bind the company clearly appears, expressly or by fair implication, in the rules, or articles, or memorandum of association.<sup>7</sup>

**360.** An ordinary commercial agent or manager, however general be his authority in conducting the business of his principal, has no implied authority to bind his principal by a guarantee of the credit of a third person.<sup>8</sup> The local agent of a bank has no implied authority to bind the bank by granting guarantees.<sup>9</sup> So in England it has been held not to be within the ordinary scope of a bank manager's authority to guarantee the payment of a draft, and the bank is therefore not liable on such a guarantee unless it can be shewn that the agent was in fact authorised to grant it.<sup>10</sup>

<sup>1</sup> *Stair*, i. 6, 44; *Bell*, *Com.* i. 135; *Fraser*, *Parent and Child*, p. 407.

<sup>2</sup> *M'Nair & Co. v. Gray, Hunter & Speirs*, 1803, *Hume*, *Decisions*, 753; *Blair v. Bryson*, 1834, 13 S. 901; *Paterson Bros. v. Gladstone*, 1891, 18 R. 403.

<sup>3</sup> *Brettel v. Williams*, 1869, L.R. 4 Ex. 623; *Bell*, *Com.* ii. 506; *Shiell's Trs. v. Scottish Property Investment Society*, 1884, 12 R. (H.L.) 14, per Lord Blackburn at p. 23.

<sup>4</sup> *Fortune v. Young*, 1918 S.C. 1, per the Lord Justice-Clerk at p. 6; cf. *Partnership Act*, 1890 (53 & 54 Vict. c. 39), s. 7.

<sup>5</sup> *Brettel v. Williams*, *supra*.

<sup>6</sup> *Sandilands v. Marsh*, 1819, 2 B. & Ald. 673.

<sup>7</sup> *Shiell's Trs. v. Scottish Property Investment Building Society*, 1883, 10 R. 1198; 1884, 12 R. (H.L.) 14, per Lord Watson at p. 24; *Re Cunningham & Co.—Simpson's Claim*, 1887, 36 Ch. Div. 532.

<sup>8</sup> *Colvin v. Dixon*, 1867, 5 M. 603, see per Lord Deas; *Hamilton v. Dixon*, 1873, 1 R. 72; *Ross, Skolfield & Co. v. State Line Steamship Co.*, 1875, 3 R. 134.

<sup>9</sup> *Hockey v. Clydesdale Bank, Ltd.*, 1898, 1 F. 119, per Lord Trayner at p. 125.

<sup>10</sup> *Re Southport Banking Co.*, 1855, 1 T.L.R. 206; cf. *Banbury v. Bank of Montreal*, [1918] A.C. 626.



SUBSECTION (3).—*Forms which the Contract may take.*

**361.** A contract of cautionry may be constituted by any words which, on a fair interpretation, import a promise to a creditor to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is liable in the first instance. In determining whether the relation of principal and surety exists, the law looks beneath the form of the transaction to its real nature. Thus, on the one hand, a person may use the term “guarantee,” and yet his undertaking may not import an obligation of the nature of cautionry;<sup>1</sup> and, on the other hand, although there is no express mention of guarantee or other technical phrase, the parties may be effectually bound as principal and cautioner.<sup>2</sup> The contract may be made directly by a letter of guarantee or a bond of caution or cash credit, or it may be read out of the correspondence and actings of the parties.<sup>3</sup> A person may undertake a cautionary obligation by pledging or mortgaging his property for the debt of another.<sup>4</sup> Again, the relation of principal and cautioner may be constituted by an order to furnish goods, or lend money, to a third person, who is himself primarily liable in payment; by a letter of credit;<sup>5</sup> by a bond of corroboration;<sup>6</sup> by an I.O.U.;<sup>7</sup> or by a document in the form of a receipt.<sup>8</sup> Further, a relation analogous to that of principal and cautioner may arise out of the contract of partnership, each partner of the firm being a cautioner for the firm, or out of the interpretation put by the law merchant on the signatures to bills. The cautioner’s obligation may be contained in the same instrument as the obligation of the principal debtor, or in a separate instrument;<sup>9</sup> and it may be undertaken either previously to the obligation of the principal debtor—provided the parties contemplate the future liability of a third party as the basis of their present contract—or contemporaneously, or subsequently.

SUBSECTION (4).—*Offer and Acceptance.*

**362.** In cautionry, as in other consensual contracts, there must be a concurrence of intention in two parties—the cautioner and the creditor; the former offers to guarantee the debt of another, and the latter accepts the offer. In regard to the offer, all that is necessary is that the words convey the meaning, and are understood by the other

<sup>1</sup> *Wilson v. Tait*, 1840, 1 Rob. App. 137; see *Lloyds Bank v. Morrison & Son*, 1927, S.N. 1.

<sup>2</sup> *M’Kenzie v. M’Taggart*, 1831, 5 W. & S. 504, per the Lord Chancellor.

<sup>3</sup> *Wallace v. Gibson*, 1895, 22 R. (H.L.) 56.

<sup>4</sup> *Bolton v. Salmon*, [1891] 2 Ch. 48.

<sup>5</sup> Bell, Com. i. 389.

<sup>6</sup> *Shiell’s Trs. v. Scottish Property Investment Society*, 1884, 12 R. (H.L.) 14; *Stocks v. M’Lagan*, 1890, 17 R. 1122, vide per Lord Kinnear (Ordinary).

<sup>7</sup> *R. v. Chambers*, 1871, L.R. 1 C.C.R. 341.

<sup>8</sup> *Field v. Thomson*, 1902, 10 S.L.T. 261.

<sup>9</sup> Bell, Com. i. 364.



party to import, that the writer intends to offer a guarantee or promises to give a guarantee.<sup>1</sup> An offer of guarantee is not binding until it is accepted. At any time before acceptance it may be withdrawn by the party making it. It depends on the character and terms of an offer whether express notice of acceptance is required, or whether an implied acceptance by acting on it is sufficient. Express acceptance of the offer is necessary where the offer contemplates express acceptance, or where the terms of the offer do not shew a clear intention on the part of the sender that it should be conclusive.<sup>2</sup> Any indication in an offer of guarantee that the writer expects something to be done preliminary to his being bound, makes express notice of acceptance imperative.<sup>3</sup> On the other hand, where an offer of guarantee is definite, unconditional, and unambiguous—however elliptically it be expressed—there is sufficient acceptance if the person to whom it is sent acts on it, though he does not expressly notify his acceptance.<sup>4</sup> Thus where a guarantee is given to enable a third party to obtain goods or an employment, it becomes binding, without notification of acceptance, as soon as the person to whom it is given supplies the goods to the third party or employs him.<sup>5</sup> The fact that an offer has been acted on is more readily construed as constituting sufficient acceptance where the offer is to guarantee a specific transaction, or set of transactions, the amount and extent of which are definitely known to the guarantor at the time of making the offer. Even, however, in the case of a guarantee of prospective or contingent debts to be contracted or liabilities to be incurred, the amount and extent of which are undefined and unknown to the guarantor at the time of making the offer, an acceptance may be implied from conduct.<sup>6</sup>

**363.** A guarantee of future dealings, if it is gratuitous and has not been formally accepted, may be withdrawn at any time, as regards liabilities not actually incurred, on due notice of revocation being sent to the creditor.<sup>7</sup> It is not a necessary condition of liability under a guarantee that the guarantee is directly addressed to the person who has acted on it. Thus a guarantee of the solvency of a third party, not bearing the name of any addressee, is binding, on proof that the granter intended it to be shewn to particular persons for the purpose of inducing them to act in a contemplated manner, and that these

<sup>1</sup> *Wallace v. Gibson*, 1895, 22 R. (H.L.) 56, per Lord Herschell at pp. 62, 63, and per Lord Watson at p. 65; *Thomson v. Dudgeon*, 1851, 13 D. 1029; 1854, 1 Macq. 714, at p. 726.

<sup>2</sup> *Thomson v. Marquess of Breadalbane*, 1854, 16 D. 943; *M'Iver v. Richardson*, 1813, 1 M. & S. 557.

<sup>3</sup> *Mozley v. Tinkler*, 1835, 1 C. M. & R. 692.

<sup>4</sup> *Wallace v. Gibson*, *supra*; *Pope v. Andrews*, 1840, 9 C. & P. 596.

<sup>5</sup> *Kennaway v. Treleaven*, 1839, 5 M. & W. 498, per Parke B.; *Hardie v. M'Donald*, 1864, 6 D. 762; *Wilson & Corse v. Woods*, 1797, Hume. Decisions, 85.

<sup>6</sup> *Ewing v. Wright*, 2nd June 1808, 14 F.C. 172; *Grant v. Campbell*, 1818, 6 Dow 239, per Lord Eldon at p. 252; *Veitch v. Murray*, 1864, 2 M. 1098; *Johnstone v. Grant*, 1844, 6 D. 875.

<sup>7</sup> *Offord v. Davies*, 1862, 12 C.B. N.S. 748; see *infra*, para. 411.

persons, in reliance on it, did act in the manner contemplated.<sup>1</sup> Where, by the terms of the offer, liability under the guarantee is made to depend on certain contingencies, it is the duty of the creditor, in addition to giving express notice that he accepts the guarantee, to advise the guarantor of the occurrence of the contingencies; if he fails to do this, the guarantor may not know that any use has been made of his guarantee, and through his ignorance may lose opportunities of obtaining indemnity from the principal debtor.<sup>2</sup> Where a defender, mistaking the meaning and effect of the document, signs a guarantee which gives full effect to the pursuer's intentions, and the pursuer is thus deceived by the reasonable reading of the guarantee as to what has been the defender's meaning, the defender cannot alter his contract by turning round and saying, "I meant what I have not stated; and although you have relied upon my statement, I will only be liable for what I meant."<sup>3</sup>

SUBSECTION (5).—*Duty of Creditor to Intending Cautioner.*

**364.** In cautionry, there is, in the ordinary case, no obligation on the part of the creditor to make a full disclosure to the proposed cautioner of all the circumstances material for the cautioner to know, which are within the knowledge of the creditor. Cautionry, unlike insurance, is not a contract *uberrimæ fidei*.<sup>4</sup> It lies with the cautioner to inform himself as to the position and credit of the principal debtor and all other matters material to the obligation he is about to undertake; and the creditor is entitled to assume that the intending cautioner has so informed himself.<sup>5</sup> Accordingly the creditor is not bound to disclose to the intending cautioner every circumstance within his knowledge which would influence a reasonable man in determining whether he is to undertake the obligation. If the cautioner asks for information, the creditor is bound to give it, and to give it truthfully.<sup>6</sup> Where the creditor, either spontaneously or in reply to questions, makes a statement which is untrue or erroneous, or which, though true in terms so far as it goes, is silent on other things which, if disclosed, would alter its whole effect, or which is of such a partial and fragmentary nature as to be substantially misleading, the cautioner will be liberated.<sup>7</sup> Not

<sup>1</sup> *Fortune v. Young*, 1918 S.C. 1; *cf. Clapperton, Paton & Co. v. Anderson*, 1881, 8 R. 1004; *Robinson v. National Bank of Scotland*, 1916 S.C. (H.L.) 154.

<sup>2</sup> *Grant v. Campbell*, 1818, 6 Dow 239; *cf. per Lord Fullerton in Watt v. National Bank*, 1839, 1 D. 827. As to conditions in guarantees, *vide infra*, para. 380, *et seq.*

<sup>3</sup> *Haymen v. Gover*, 1872, 25 L.T. Q.B. 903, *per Cockburn C.J.*; *Mags. of Aberdeen v. Robison*, 1858, 20 D. 668; *Wallace v. Gibson*, 1895, 22 R. (H.L.) 56.

<sup>4</sup> *Lee v. Jones*, 1864, 17 C.B. N.S. 482, *per Blackburn J.* at p. 503; *Seaton v. Heath*, [1899] 1 Q.B. 782, *per Romer L.J.* at p. 793.

<sup>5</sup> *Young v. Clydesdale Bank, Ltd.*, 1889, 17 R. 231; *Hamilton v. Watson*, 1842, 5 D. 280; 1845, 4 Bell's App. 67; *Royal Bank of Scotland v. Greenshields*, 1914 S.C. 259.

<sup>6</sup> *Young v. Clydesdale Bank, Ltd.*, *supra*, *per Lord Shand* at p. 244.

<sup>7</sup> *Railton v. Mathews*, 1844, 6 D. 536; *rev.* 1844, 3 Bell's App. 56; *British Guarantee Association v. Western Bank*, 1853, 15 D. 834; *Royal Bank of Scotland v. Rankine*, 1844, 6 D. 1418; *Falconer v. North of Scotland Banking Co.*, 1863, 1 M. 704, *per Lord Justice-Clerk Inglis* at p. 712; *London General Omnibus Co. v. Holloway*, [1912] 2 K.B. 72, at p. 77.

infrequently the circumstances are such that, if any statement at all is made on a point, the whole truth on the point must be told. It is also sufficient to invalidate the contract if it appears that the creditor, knowing that the cautioner was undertaking the obligation on an erroneous belief as to material facts, allowed him to proceed in that erroneous belief.<sup>1</sup> Suretyship is a contract in which very little said, which ought not to have been said, and very little not said, which ought to have been said, is sufficient to prevent the contract from being valid.<sup>2</sup>

**365.** The application of these principles is illustrated in *Royal Bank of Scotland v. Greenshields*.<sup>1</sup> There a cautioner undertook a general guarantee of the indebtedness to the bank of a debtor, who at the date of the guarantee was indebted to the bank in £300 on an overdrawn account, and in £1100 in respect of certain accommodation bills. In an interview between the intending cautioner and the bank agent the overdraft was referred to, but the bank agent did not mention the indebtedness on the bills. The Court, on the evidence as to what was said at the interview, held that the reference there made to the overdraft, being incidental and not in answer to a question, was not such as to impose on the bank agent a duty to disclose the indebtedness on the bills. But it was observed by Lord Johnston that if the bank agent had said in answer to a question, "the indebtedness is £300 on overdraft," he would undoubtedly have been bound to add "but that is not all his liability"; and by Lord Mackenzie that, if the intending cautioner had made a statement to the bank agent, or in his presence, which plainly shewed that he was entering into the transaction in an entire misapprehension of the facts, then the bank agent would have been under an obligation, arising out of the circumstances of the case, to prevent the cautioner from being misled. If circumstances likely to influence an intending cautioner to undertake the obligation have been represented by the creditor as existing, and they cease to exist before the guarantee is undertaken, it is the duty of the creditor to inform the cautioner.<sup>3</sup>

**366.** Where a guarantee of a money debt is valid at its inception, the creditor is not bound to inform the cautioner of circumstances subsequently coming to his knowledge which seriously affect the credit of the principal debtor and the hazards of the cautioner's undertaking.<sup>4</sup> It may, however, be incumbent on the creditor, after such circumstances have come to his knowledge, to refrain from giving the principal debtor fresh accommodation so as to increase the extent of the cautioner's liability.<sup>5</sup>

<sup>1</sup> *Royal Bank of Scotland v. Greenshields*, *supra*, per Lord Mackenzie at p. 272; *Lee v. Jones*, 1864, 17 C.B. N.S. 482, at p. 507.

<sup>2</sup> *Davies v. London and Provincial Marine Insurance Co.*, 1878, 8 Ch. D. 469, per Fry J. at p. 475.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Bank of Scotland v. Morrison*, 1911 S.C. 593; *National Provincial Bank of England, Ltd. v. Glenusk*, [1913] 3 K.B. 335.

<sup>5</sup> *Bank of Scotland v. Morrison*, *supra*, per Lord Salvesen at pp. 605, 606.



**337.** The general rule that there is no duty on the creditor spontaneously to disclose to the cautioner all facts within his knowledge material to the risk suffers exception where, in the relations between the creditor and the principal debtor, there exists some material fact which the cautioner might reasonably not expect to exist. The non-disclosure of such a fact is regarded as being an implied representation that the fact does not exist.<sup>1</sup> In the case of the guarantee of a debt, the criterion to be applied in determining whether disclosure should be made voluntarily by the creditor has been stated to be "whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor to the effect that his position shall be different from that which the surety might naturally expect."<sup>2</sup> It is in each case a question of fact whether a bargain between the creditor and the debtor, which affects the responsibility of the cautioner, is one which was not reasonably to be expected by the cautioner, and, therefore, is one, the non-disclosure of which is equivalent to an implied representation that it did not exist.<sup>3</sup>

**332.** The principle that the concealment of a material circumstance, which the cautioner might reasonably not expect to exist, is construed as an implied representation by the creditor that that circumstance does not exist has a wide application in guarantees of the good conduct of servants or agents. The position of the cautioner in a fidelity guarantee is in many respects different from that of a cautioner for a money debt.<sup>4</sup> In the case of a guarantee for payment of a money debt the cautioner is presumably able—better able than the creditor—to inform himself as to the financial position and credit of the principal debtor and other matters affecting the risk of the obligation. On the other hand, an employer taking a guarantee for the fidelity of a servant has opportunities, not available to the cautioner, of judging of the character and conduct of the servant;<sup>5</sup> and the fact that he continues the servant in his employment may fairly be regarded as in itself implying that he considers him trustworthy. Where then an employer takes a guarantee for the honesty or good conduct of a servant whom he employs in a position of trust, the fact of the employment imports a representation by the employer to the cautioner that the servant is trustworthy, so far as the employer knows, and the non-disclosure of a fact, known to the employer but not known to

<sup>1</sup> *Hamilton v. Watson*, 1845, 4 Bell's App. 67; *Lee v. Jones*, 1864, 17 C.B. N.S. 482; *Falconer v. North of Scotland Bank*, 1863, 1 M. 704.

<sup>2</sup> Per Lord Campbell in *Hamilton v. Watson*, 1845, 4 Bell's App. 67, at p. 103.

<sup>3</sup> *Falconer v. North of Scotland Bank*, *supra*; *Lee v. Jones*, *supra*, per Blackburn J. at p. 506; *Pidcock v. Bishop*, 1825, 3 B. & C. 605; *Stone v. Compton*, 1838, 5 Bing. N.C. 142.

<sup>4</sup> Bell, Com. i. 380.

<sup>5</sup> As to the relation between the employer and cautioner which in a fidelity guarantee imposes special responsibilities on the employer, see *Bank of Scotland v. Morrison*, 1911 S.C. 533, per Lord Mackenzie at p. 601; cf. *London General Omnibus Co. v. Holloway*, [1912] 2 K.B. 72; *Wallace's Factor v. M'Kissock*, 1898, 25 R. 642, per Lord M'Laren at p. 653.



the cautioner, materially affecting the servant's trustworthiness, avoids the guarantee.<sup>1</sup>

**363.** In determining whether the undisclosed fact is material, the question to be considered is, Would the cautioner have undertaken the guarantee if the fact had been disclosed to him?<sup>2</sup> If the fact was such as ought to have been communicated, the motive of withholding it is wholly immaterial.<sup>3</sup> Even where the cautioner intervenes at the request and in the interest of the servant only, the employer is not absolved from the duty of disclosing to the cautioner any previous dishonesty of the servant known to the employer.<sup>4</sup> Further, if an employer, who holds a fidelity guarantee, becomes aware that the servant, during the currency of the guarantee, has committed an act of dishonesty in his employment, it is the duty of the employer forthwith to intimate it to the cautioner. Failure on the part of the employer to communicate his knowledge of the offence, as soon as he becomes aware of it, frees the cautioner from liability.<sup>5</sup> In the case of a bond of caution for a judicial factor on a trust estate it was held that the failure of the agent of the beneficiaries to inform the cautioner, on the occasion of his becoming cautioner, that the factor had omitted to notify to the Accountant of Court the death of the previous cautioner and had continued for a period to render his accounts upon the false statement that the previous cautioner was alive, did not vitiate the cautioner's engagement—these actings of the factor, though irregular and in breach of his statutory duty, not being such as to lead to an inference that he would be dishonest in his dealings with the trust estate.<sup>6</sup>

**370.** The fact that the cautioner is induced to undertake the obligation by the fraud of, or misrepresentations made by, the principal debtor is not a ground on which the cautioner is freed from his liability to the creditor.<sup>7</sup> But the cautioner will be released if it be shewn that the creditor was a party to the misrepresentations made by the principal debtor or knowingly assisted him in misleading the cautioner.<sup>8</sup>

<sup>1</sup> *Smith v. Bank of Scotland*, 1813, 1 Dow 272, per Lord Eldon at p. 294. The judgment of Lord Eldon, as explained by Blackburn J. in *Lee v. Jones*, 1864, 17 C.B. N.S. 482, at p. 506, proceeded on the ground that it was so little to be expected that the bank would continue in their service an agent who had already committed a breach of trust that the taking of the guarantee amounted to holding him forth to the surety as a trustworthy person (*Railton v. Matthews*, 1844, 3 Bell's App. 56; *French v. Cameron*, 1893, 20 R. 966).

<sup>2</sup> *London General Omnibus Co. v. Hollway*, [1912] 2 K.B. 72, at p. 77.

<sup>3</sup> *Railton v. Matthews*, 1844, 3 Bell's App. 56, per Lord Cottenham and Lord Campbell.

<sup>4</sup> *French v. Cameron*, *supra*, per Lord Trayner at p. 973.

<sup>5</sup> *Snaddon v. London, Edinburgh, and Glasgow Assurance Co., Ltd.*, 1902, 5 F. 182; *Leith Bank v. Bell*, 1830, 8 S. 721; *affd.* 1831, 5 W. & S. 703; *Thomson v. Bank of Scotland*, 1824, 2 Sh. App. 316; *Thistle Friendly Society of Aberdeen v. Garden*, 1834, 12 S. 745.

<sup>6</sup> *Wallace's Factor v. M'Kissock*, 1898, 25 R. 642.

<sup>7</sup> *Young v. Clydesdale Bank, Ltd.*, 1889, 17 R. 231; *Wallace's Factor v. M'Kissock*, *supra*, at pp. 649, 652; *Spencer v. Handley*, 1842, 4 M. & G. 414.

<sup>8</sup> *Sutherland v. W. M. Low & Co., Ltd.*, 1901, 3 F. 972. An averment that misrepresentations were made by the principal debtor "for himself and on behalf of" the creditor is, without further specification, not relevant (*Aitken v. Pyper*, 1900, 38 S.L.R. 74).

## SECTION 6.—PROOF OF THE CONTRACT.

SUBSECTION (1).—*At Common Law.*

371. From an early period, cautionary obligations—though, according to what appears the better opinion, constituted by consent—could in the ordinary case be proved only by written instrument.<sup>1</sup> Further, though the old Scots statutes regulating the authentication of writs properly relate only to writings constituting obligations or titles—documents operating by their own force as written instruments as distinct from writings expressing or recording consensual contracts and operating merely *in modum probationis*<sup>2</sup>—yet, owing to the tendency in the older law, in every case where proof in writing was necessary, to require a formal instrument authenticated in the manner prescribed by the statutes, it undoubtedly became the general rule to require that the written instrument evidencing the obligation should be holograph or probative in terms of the statutes.<sup>3</sup> But, on the assumption that the common law demands a probative writing in evidence of the contract, or as the basis of the obligation, this common law rule is subject to certain recognised exceptions: (1) A probative writing is not necessary in a guarantee *in re mercatoria*.<sup>4</sup> (2) An improbative writing, signed by the granter, is binding if there has been *rei interventus*. Thus, for example, if advances have been made on the faith of it, such advances bar any right to resile.<sup>5</sup> (3) At common law a verbal guarantee for the price of goods, given at the time when the contract for the sale of the goods was concluded and as an incident of the sale, was binding and could be proved *prout de jure*.<sup>6</sup>

SUBSECTION (2).—*Under s. 6 of the Mercantile Law Amendment Act, 1856.*

372. It is provided by the Mercantile Law Amendment Act, 1856,<sup>7</sup> that “all guarantees, securities, or cautionary obligations made or

<sup>1</sup> Ersk. iv. 2, 20; Bell, Com. i. 388.

<sup>2</sup> *Paterson v. Paterson*, 1897, 25 R. 144, per Lord Kyllachy at p. 173.

<sup>3</sup> *Church of England Life Association Co. v. Hodges*, 1857, 19 D. 414. The question whether at common law—in cases not coming within any of the recognised exceptions—a probative writing is requisite to make a cautionary obligation binding is one on which there is a marked conflict of authority. Contrast Bell, Prin. ss. 18 and 249, with Dickson on Evidence, s. 603. Cf. authorities cited by Lord Moncreiff in *Paterson v. Paterson*, *supra*, at p. 167. The fact that at common law the obligation of a cautioner might be established by an oath on reference (Bell, Prin. s. 249; Dickson on Evidence, s. 602) is an element going to shew that the writ is only evidence of the contract and need not be probative (*vide Paterson v. Paterson*, *supra*, per Lord Kyllachy at p. 174).

<sup>4</sup> Bell, Com. i. 324; Dickson on Evidence, s. 793; *Paterson v. Wright*, 31st January 1810, F.C.; *affd.* (H.L.) 1814, Pat. App. 38; *Johnston v. Grant*, 1844, 6 D. 875.

<sup>5</sup> Ersk. iii. 2, 3; Bell, Com. i. 346; *Ballantyne v. Carter*, 1842, 4 D. 419; *Johnston v. Grant*, *supra*; *National Bank v. Campbell*, 1892, 19 R. 885, per Lord McLaren at p. 892.

<sup>6</sup> Bell, 13th November 1812, F.C.; *Rhind v. Mackenzie*, 20th February 1816, F.C. See observations by Lord Selwess on these cases in *Darlin v. McKelvie*, 1915 S.C. 180, at pp. 186, 187.

<sup>7</sup> 19 & 20 Vict. c. 60, s. 6.

granted by any person for any other person, and all representations and assurances as to the character, conduct, credit and ability, trade or dealings of any person made or granted to the effect, or for the purpose, of enabling such person to obtain credit, money, goods, or postponement of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations or assurances, or by some person duly authorised by him or them; otherwise the same shall have no effect." The effect of this provision is clearly to render unenforceable a guarantee or cautionary obligation or other undertaking or representation, coming within its terms, unless it is in writing and subscribed as the statute prescribes. The Act does not, however, say whether the mere subscription of the granter is enough, or whether the document must be holograph or probative. The question whether, in any particular case, formal attestation is necessary, remains therefore to be determined under the rules of common law.<sup>1</sup> There is, as has been stated above, a conflict of authority on the question whether, at common law, in cautionary or guarantee, writing is required in solemnity or merely *in modum probationis*, and on the kindred question<sup>2</sup> whether—unless the guarantee is *in re mercatoria* or there has been *rei interventus*—the writing must be in probative form. As regards the question whether, under s. 6 of the Mercantile Law Amendment Act, writing and subscription are made essential to the constitution of a cautionary obligation or are merely required *in modum probationis*, Lord Watson has pointed out that in a Scottish Court that question can never be of any except academical interest. "In a foreign Court," he adds "whose curial rules differ from the law of Scotland, the question might become of importance."<sup>3</sup>

373. As regards the further question whether a formally attested writing is necessary or whether an improbative writing, signed by the granter or some person duly authorised by him, is sufficient, it is plain that under the Act, as at common law, an improbative writing signed by the cautioner or some person duly authorised by him is sufficient in the case of a guarantee *in re mercatoria*, and also in the case of any cautionary obligation or guarantee in reliance on which advances have been made or in respect of which there has followed any such change of circumstances as would constitute *rei interventus*. It, however, remains undecided whether, in the case of a non-mercantile guarantee on which nothing constituting *rei interventus* has followed—e.g. a guarantee for a debt already incurred or for the fidelity of a servant already in the employer's service—it is sufficient that it is in writing and subscribed by the granter

<sup>1</sup> See Lord M'Laren's note on s. 6 of the Mercantile Law Amendment Act, in his edition of Bell's Commentaries, i. 407.

<sup>2</sup> If the writing be only evidence of the contract it would be more in accordance with principle to hold that a formally attested writing is not necessary (*Bryan v. Butters Bros. & Co.*, 1892, 19 R. 490, per Lord Kyllachy at pp. 492, 493; *Paterson v. Paterson*, 1897, 25 R. 144, per Lord Kyllachy at pp. 173, 174.

<sup>3</sup> *Wallace v. Gibson*, 1895, 22 R. (H.L.) 56, per Lord Watson at p. 66.



or whether the common law demands in addition that it should be executed with the formalities necessary to a probative writ. In *Snaddon v. London, Edinburgh, and Glasgow Assurance Co., Ltd.*<sup>1</sup> it was held by Lord Kyllachy in the Outer House that an improbative fidelity guarantee, signed by the cautioner, was, in the absence of proof of *rei interventus*, invalid. But in the Inner House that ground of judgment was not adopted. It was there assumed that the improbative writing was sufficient to bind the cautioner without any *rei interventus*, and, on that assumption, it was held that the cautioner had been freed by the subsequent actings of the employer.

**374.** The provisions of s. 6 of the Mercantile Law Amendment Act are, in substance, similar to the enactments of certain English statutes—the Statute of Frauds (29 Car. II. c. 3), s. 4, and Lord Tenterden's Act (9 Geo. IV. c. 14), s. 6. Further, it has been expressly stated by Lord Blackburn<sup>2</sup> that, as regards the proof of a contract to answer for the debt of another, the general purpose and effect of s. 6 of the Mercantile Law Amendment Act is to extend the law of England, as enacted in s. 4 of the Statute of Frauds, to Scotland; and Lord Watson<sup>3</sup> has pointed out that the enactment in s. 6 with respect to representations as to the credit of a third person is in substance the same as the provisions of s. 6 of Lord Tenterden's Act. Accordingly the decisions of the Courts in England on the application and requirements of the English enactments are recognised—subject to certain differences in the actual words used in the respective statutes—as affording useful guidance in the interpretation of the corresponding Scottish enactment.

**375.** In England it is settled that writing is necessary only in evidence of the contract, not to constitute it;<sup>4</sup> and though the words of the Scots statute, “otherwise the same shall have no effect,” are stronger than the words of s. 4 of the Statute of Frauds,<sup>5</sup> it is probable that the correct interpretation of the Scots statute is similar.<sup>6</sup> The writing must furnish reasonably clear evidence of the guarantee undertaken; and if it is so vague that the nature of the undertaking cannot be made out from the terms of the instrument, it will not constitute a sufficient memorandum, and parole evidence is not admissible to supply or make out the promise.<sup>7</sup> The writing may consist of different papers, provided that the document signed by the guarantor is so connected with the other papers that they can be read together so as to form one memorandum of the contract.<sup>8</sup> This connection, however, cannot be supplied by parole evidence; it must, in order to satisfy the statute,

<sup>1</sup> 1902, 5 F. 182.

<sup>2</sup> *Walker's Trs. v. MacKinlay*, 1880, 7 R. (H.L.) 85, at p. 88.

<sup>3</sup> *Clydesdale Bank, Ltd. v. Paton*, 1896, 23 R. (H.L.) 22 at p. 25.

<sup>4</sup> *Vide per Lord Blackburn in Maddison v. Alderson*, 1883, 8 App. Cas. 467, at p. 467—a passage cited and approved in many subsequent cases.

<sup>5</sup> The words of s. 4 of the Statute of Frauds are “No action shall be brought.”

<sup>6</sup> Cf. *Wallace v. Gibson*, 1895, 22 R. (H.L.) 56, per Lord Wellwood at pp. 58 and 59.

<sup>7</sup> *Holmes v. Mitchell*, 1859, 7 C.B. N.S. 361.

<sup>8</sup> *Ridgway v. Wharton*, 1857, 6 H.L. Cas. 238.



appear upon the face of the documents themselves.<sup>1</sup> The writing may be merely an offer which has met with an express acceptance, or which has been impliedly accepted by being acted upon.<sup>2</sup> "The memorandum need not have the character of a contract."<sup>3</sup> The purpose for which the memorandum was made is quite immaterial, provided it furnishes evidence of the guarantee and is signed by the party undertaking the obligation.<sup>4</sup>

376. As regards the signature, it is sufficient if the writing is signed by the person against whom it is sought to found liability, or by someone authorised by him. In Scotland, if the document be neither holograph nor tested, the onus lies on the creditor to prove not only the genuineness of the signature, but also that it was adhibited to the document as it stands, or that there was authority given to write over it what appears to have been written there.<sup>5</sup> In construing s. 4 of the Statute of Frauds, which requires a "signature," the English Courts have held that the signature need not be at the end of the writing, but that it is sufficient, in whatever part of the document it be introduced, if it be so placed as to authenticate the whole contents of the document.<sup>6</sup> The use of the more definite term "subscribed" in s. 6 of the Mercantile Law Amendment Act, instead of the more general term "signed" in the English statute, may lead our Courts to a more strict interpretation of what is required to satisfy the Scots statute.<sup>7</sup> In England, the initials of the obligant,<sup>8</sup> or his mark,<sup>9</sup> is a sufficient signature within the statute.

377. The authority to subscribe may be either express or implied. The fact that the person subscribing was expressly authorised to subscribe, or acted within the scope of his implied authority in subscribing, may be proved by parole.<sup>10</sup> Wherever one has authority to enter into a contract of guarantee on behalf of another, he has an implied authority to sign the writing which is necessary for the effectual execution of the contract.<sup>11</sup>

<sup>1</sup> *Crane v. Powell*, 1868, L.R. 4 C.P. 123, per Willes J.; *Taylor v. Smith*, [1893] 2 Q.B. 65.

<sup>2</sup> *Wallace v. Gibson*, 1895, 22 R. (H.L.) 56.

<sup>3</sup> Per Willes J. in *Gibson v. Holland*, 1865, L.R. 1 C.P. 1.

<sup>4</sup> *In re Hoyle*, [1893] 1 Ch. 84, per Lindley L.J. and Bowen L.J.

<sup>5</sup> *Wylie & Lockhead v. Hornsby*, 1889, 16 R. 907.

<sup>6</sup> *Caton v. Caton*, 1867, L.R. 2 H.L. 127; *Evans v. Hoare*, [1892] 1 Q.B. 593; *In re Hoyle*, [1893] 1 Ch. 84.

<sup>7</sup> In *Weir v. Robertson*, 1872, 10 M. 438, an unsubscribed holograph offer regarding heritage, containing the writer's name *in gremio*, delivered for the purpose of being acted on, was held binding on the writer when accepted.

<sup>8</sup> *In re Blewitt*, 1880, L.R. 5 P.D. 116.

<sup>9</sup> *Baker v. Denning*, 1838, 8 A. & E. 96.

<sup>10</sup> *Vide Salton & Co.*, 1898, 1 F. 110, per Lord Trayner at p. 118; also *Field v. Thomson*, 1902, 10 S.L.T. 261, per Lord Kyllachy at p. 263; *James v. Smith*, [1891] 1 Ch. 384.

<sup>11</sup> *Durrell v. Evans*, 1862, 1 H. & C. 174; *Bank of Scotland v. Rorie*, 1908, 16 S.L.T. 21; *Deuchar v. Gas Light and Coke Co.*, [1925] A.C. 691. As to the authority of a partner of a firm, directors of a company, or an agent to bind the firm, company, or principal in a guarantee of the debt of a third party, see *supra*, paras. 358 to 360.

**378.** The representations specified in s. 6 of the Mercantile Law Amendment Act include all representations of the character, and made with the purpose, specified however false and however fraudulent.<sup>1</sup> But only statements really going to an assurance of personal credit are within the statute.<sup>2</sup> The section applies not only to representations founded on as a substantive ground of action, but also to representations founded on in defence.<sup>3</sup> There is an important distinction between s. 6 of Lord Tenterden's Act<sup>4</sup> and the corresponding provision in s. 6 of the Mercantile Law Amendment Act as to the person by whom the writing making a representation as to the credit of a third party may be subscribed. In the English statute it is enacted that the representation must be "signed by the party to be charged therewith." In the Scottish Act the writing, like a writing containing a guarantee, may be subscribed either by the person making the representation "or by some person duly authorised by him." Accordingly, in Scotland, where a representation as to the credit of another, though false and fraudulent and made without the express authority of the principal, is made and subscribed by an agent in a matter within the general scope of his authority, the principal is liable as he would be for any other wrongful act of the agent about his business.<sup>5</sup> This holds even where the agent's fraud was not intended to benefit, and did not in fact benefit, the principal.<sup>6</sup>

#### SECTION 7.—RULES OF CONSTRUCTION.

**379.** Where a cautionary obligation is embodied in a formal bond, it is a general rule of construction that the obligation of the cautioner is to be interpreted strictly.<sup>7</sup> The strict interpretation of a bond of caution, however, means no more than that the cautioner's responsibility will not be extended beyond the precise terms of his engagement, and that, where these terms are ambiguous, the cautioner has the benefit of the doubt.<sup>8</sup> On the other hand, where a cautioner is bound in an ordinary mercantile guarantee, there is no presumption either way in regard to the construction of the document. Such a document is construed according to its fair meaning, when read in the light of surrounding circumstances.<sup>9</sup> Very often the writing containing a guarantee is expressed in loose or elliptical language, so that it is difficult to get any definite meaning out of it by construing the document by itself. In

<sup>1</sup> *Clydesdale Bank, Ltd. v. Paton*, 23 R. (H.L.) 22, per Lord Watson at p. 27.

<sup>2</sup> *Clydesdale Bank, Ltd. v. Paton*, *supra*; *Banbury v. Bank of Montreal*, [1918] A.C. 626; *Union Bank of Scotland v. Taylor*, 1925 S.C. 835.

<sup>3</sup> *Union Bank of Scotland v. Taylor*, *supra*.

<sup>4</sup> 9 Geo. IV. c. 14.

<sup>5</sup> *Houldsworth v. City of Glasgow Bank*, 1880, 7 R. (H.L.) 53 at p. 57.

<sup>6</sup> *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716.

<sup>7</sup> Bell, Prin. ss. 251, 285, and cases there cited.

<sup>8</sup> *Baird v. Corbett*, 1835, 14 S. 41; *Napier v. Bruce*, 1840, 2 D. 556; *affd.* 1842, 1 Bell's App. 78; *Stewart v. Forbes*, 1897, 24 R. 1112.

<sup>9</sup> *Veitch v. Murray*, 1864, 2 M. 1098; *Caledonian Banking Co. v. Kennedy*, 1870, 8 M. 862.

these circumstances it is both competent and necessary, in reading the contract, to have regard to the position of the parties at the date when the transaction was entered into.<sup>1</sup> So the usage of the trade, in respect to which a mercantile guarantee is granted, may be proved by parole. Such evidence may attach a special meaning to expressions in the document, and may also be important in determining the nature and extent of the liability incurred by the guarantor.<sup>2</sup> While parole evidence of surrounding circumstances or of trade usage is competent to expound the language and ascertain the real intention of the contracting parties as expressed in the writing, it cannot avail to contradict or vary the language of the written contract; and proof of mere verbal communications or statements made by the parties at the time when the guarantee was given is incompetent.<sup>3</sup>

## SECTION 8.—CONDITIONS.

### SUBSECTION (1).—*Express Conditions.*

**380.** In contracts of guarantee, both undertakings preliminary to the contract and provisions or stipulations in the contract itself are readily—more readily, as appears from the cases, than in other ordinary mercantile contracts—construed by the Courts as constituting conditions either precedent or resolute, especially where the obligation of the cautioner has been undertaken gratuitously; and when once an undertaking or stipulation is ascertained to be a condition, the breach or non-fulfilment of it on the part of the creditor *eo ipso* liberates the cautioner from his engagement, though it cannot be shewn that the latter has incurred any actual loss through the non-performance of the condition.<sup>4</sup> By express stipulation, acts or events of the most various kinds may be made conditions precedent to the cautioner's liability. "Parties may think some matter, apparently of very trivial importance, essential: and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent it will be one."<sup>5</sup> The conditions which most commonly are expressly stipulated for, are those of a precautionary nature made with a view to guard the cautioner against loss, as, for instance, that a policy of insurance be effected;<sup>6</sup> that an invoice and note of the price of the goods, whose payment is guaranteed, should

<sup>1</sup> *Barr v. Downie*, 1840, 3 D. 59; *Caledonian Banking Co. v. Kennedy*, *supra*; *Morrell v. Cowan*, 1877, 7 Ch. D. 151, per Thesiger L.J.; *Calder v. Aitcheson*, 1831, 5 W. & S. 410.

<sup>2</sup> *MacLaggan v. Macfarlan*, 19th November 1813, F.C.; *Calder & Co. v. Cruikshank's Tr.*, 1889, 17 R. 74, see per Lord Pres. Inglis.

<sup>3</sup> *Thorburn v. Howie*, 1863, 1 M. 1169, per Lord Deas.

<sup>4</sup> *Grieve v. Dow*, 1839, 1 D. 738; *Drummond v. Rannie*, 1834, 14 S. 437; *Haworth v. Sickness and Accident Assurance Association*, 1891, 18 R. 563; *Clydebank and District Water Trs. v. Fidelity and Deposit Co. of Maryland*, 1915 S.C. 362, 1916 S.C. (H.L.) 69; *Anderson v. Fitzgerald*, 1853, 4 H.L. Cas. 484, per Cranworth L.J. at p. 503.

<sup>5</sup> Per Blackburn J. in *Bellini v. Gye*, 1876, 1 Q.B.D. 183, at p. 187.

<sup>6</sup> *Watts v. Shuttleworth*, 1861, 7 H. & N. 353.



be sent; <sup>1</sup> that the principal debtor should periodically account to the creditor; <sup>2</sup> that satisfactory references be given.<sup>3</sup>

SUBSECTION (2).—*Conditions implied from Terms of Contract.*

381. A condition, though not expressly stipulated, may be extracted from the terms of a guarantee. Where, for example, a guarantee bears to be undertaken in consideration of something being done by the creditor, the doing of that thing is a condition precedent to the creditor's right to enforce the guarantee.<sup>4</sup> Similarly, where in a guarantee a certain course of conduct is marked out for the creditor, the mode of procedure so marked out must not be departed from by him; for such a departure would be a violation of the agreement between the parties.<sup>5</sup>

SUBSECTION (3).—*Proof of Conditions not contained in the Written Instrument.*

382. An undertaking by the creditor, or an agreement between the creditor and the cautioner, may be quite effectual to constitute a condition precedent to the liability of the cautioner, although it is separate from, and is not referred to in the bond of caution or letter of guarantee.<sup>6</sup> As regards the proof of undertakings and agreements, which, though existing apart from the written instrument setting forth the contract, yet serve to import conditions into the cautioner's obligation, it is a general rule that they can be set up only by writing or by the oath of the party whose right is limited by the alleged condition; <sup>7</sup> for when parties embody their agreement in a written instrument, there is a presumption that the instrument contains a full exposition of the terms of the agreement. This presumption may, however, be rebutted, and the door opened to oral proof by admissions on record that the written contract does not contain a true or full account of the transaction, or by the production of writings of the creditor, however informal, leading to a similar conclusion.<sup>8</sup> While it is only in special circumstances that it is competent, in a question between the creditor and the obligants, to add a term or condition to a formal written contract, or to qualify the written instrument, by parole evidence, it is

<sup>1</sup> *Thomson v. Breadalbane*, 1854, 16 D. 943.

<sup>2</sup> *Hamilton v. Calder*, 1706, Mor. 2091.

<sup>3</sup> *Morten v. Marshall*, 1863, 2 H. & C. 305.

<sup>4</sup> *Lawrence v. Walmsley*, 1862, 31 L.J. C.P. 143; *Rolt v. Cozens*, 1856, 18 C.B. 673; *Rickaby v. Lewis*, 1905, 22 T.L.R. 130.

<sup>5</sup> *Murray v. Lee*, 1882, 9 R. 1040; *M'Tavish v. Scott*, 1830, 4 W. & S. 410; *Hill v. Hadley*, 1835, 2 A. & E. 758; cf. also *Drummond v. Rannie*, 1836, 14 S. 437; *M'Murray v. MacFarlane*, 1894, 31 S.L.R. 531.

<sup>6</sup> *Stein's Assignees v. Brunton*, 1833, 11 S. 373; affd. 1834, 7 W. & S. 489; *Culcreuch Cotton Co. v. Mathie*, 1823, 2 S. (N.E.) 450; *Wilson v. More*, 1833, 11 S. 345; *British Guarantee Association v. Western Bank*, 1853, 15 D. 834; *Dickson on Evidence*, s. 1036.

<sup>7</sup> *Jackson v. M'Iver*, 1875, 2 R. 882; *Dickson on Evidence*, ss. 1017, 1020.

<sup>8</sup> *Blackwood v. Hay*, 1858, 20 D. 631; *Grant's Trs. v. Morison*, 1875, 2 R. 377; *M'Murray v. MacFarlane*, 1894, 31 S.L.R. 531; *Culcreuch Cotton Co. v. Mathie*, 1823, 2 S. (N.E.) 450.



always admissible to lead parole evidence to establish agreements between the obligants themselves made with a view to regulating their rights and liabilities *inter se*.<sup>1</sup> Thus an agreement between the cautioner-obligants in a cash-credit bond, under which a special security was to be held by one of the cautioners and not to be communicated by him to the others, was allowed to be proved by parole.<sup>2</sup>

#### SUBSECTION (4).—*Conditions implied by Law.*

**383.** Certain conditions precedent to the liability of a cautioner are implied by law. Thus it is an implied condition of the liability of a cautioner, that there should come into existence a valid obligation on the part of the principal debtor; <sup>3</sup> also that, before the cautioner be called on, the principal debtor should have failed to perform his obligation.<sup>4</sup> Where several persons have agreed to join in a cautionary obligation, it is a condition precedent to the liability of each signatory that the bond should be duly signed by the whole number.<sup>5</sup> In bonds of judicial cautionry, however, there is no duty on the creditor to see that the bond is duly signed; and accordingly, in a bond of caution in a suspension, it was held that the fact of one of the cautioner's signatures turning out to be forged did not prevent the bond being enforced against the others who had signed.<sup>6</sup> Again, it is an implied condition of the continuance of the liability of a cautioner that in all transactions subsequent to the original contract the creditor preserve intact all the cautioner's remedies.<sup>7</sup>

#### SECTION 9.—EXTENT OF CAUTIONER'S LIABILITY.

**384.** As cautionry is a strictly accessory contract, it is fundamental that, while a cautioner may be bound for the whole of the principal debt, he is not liable for a greater sum than that due by the principal debtor.<sup>8</sup> The obligation undertaken by a cautioner may, however, be expressed in terms which render the obligant liable not only in a cautionary obligation contingent on the default of the principal debtor, but also in an independent obligation, distinct from, or more extensive than, that of

<sup>1</sup> *Kilpatrick v. Kilpatrick*, 1841, 4 D. 109; *Lindsay v. Barmcotte*, 1851, 13 D. 718; *Morton's Tr. v. Robertson's Judicial Factor*, 1892, 20 R. 72, per Lord McLaren; *Thow's Tr. v. Young*, 1910 S.C. 588.

<sup>2</sup> *Hamilton & Co. v. Freeth*, 1889, 16 R. 1022.

<sup>3</sup> *Lakeman v. Mountstephen*, 1894, L.R. 7 H.L. 17, at p. 26.

<sup>4</sup> *Ross v. Greig*, 1834, 12 S. 427; *Wright v. O'Henley*, 1827, 5 S. 311; *Walker v. British Guarantee Association*, 1852, 18 Q.B. 277.

<sup>5</sup> *Paterson v. Bonar*, 1844, 6 D. 987; *Scottish Provincial Assurance Co. v. Pringle*, 1858, 20 D. 465; *National Provincial Bank of England v. Brackenbury*, 1906, 23 T.L.R. 797; *Fitzgerald v. McCowan*, [1898] 2 Ir. R. 1; *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q.B. 75; *Evans v. Bremridge*, 1856, 8 De G. M. & G. 101.

<sup>6</sup> *Simpson v. Fleming*, 1860, 22 D. 679.

<sup>7</sup> *Infra*, para. 406, *et seq*  
<sup>8</sup> *Ersk. Inst.* iii. 3, 64; *Jackson v. M'Iver*, 1875, 2 R. 882; *Ex parte Young, In re Kitchin*, 1881, 17 Ch. D. at p. 671.

the principal debtor.<sup>1</sup> While the obligation of a cautioner, as cautioner, cannot be more onerous than that of the principal debtor, it may be in any degree less onerous, either in respect of its amount or in respect of the time, place, or manner of its performance.<sup>2</sup> In the ordinary case, where there is no limitation or restriction on the cautioner's liability, the cautioner is held to have made himself liable for the actual transaction as arranged between the principal parties, so that the measure of his liability is the total actual loss sustained by the creditor from the debtor's failure to perform his obligation.<sup>3</sup> On the same principle, the cautioner's liability, if his guarantee is undertaken in general terms, extends to any incidental debts due by the principal debtor to the creditor arising directly out of the primary obligation; as, for instance, to a debt due to the creditor by the principal debtor as guarantor of a third party;<sup>4</sup> to a claim for interest on the debt, if it be not paid when due;<sup>5</sup> or to a claim for expenses necessarily incurred by the creditor.<sup>6</sup> A creditor, however, to whom a guarantee has been given, must be cautious in incurring incidental expenses, in reliance upon being recouped by the guarantor.<sup>7</sup> In an action by the creditor against the surety the amount of the surety's liability must be proved, and no admission or acknowledgment by the principal debtor can fix the surety with an amount other than that which was really due.<sup>8</sup> It is common, *e.g.* in cash-credit bonds, to stipulate that the sum or balance due shall be ascertained by the certificate of an official of the bank. But such a certificate is not conclusive against the cautioners. The cautioners are entitled, either by way of suspension, if a charge is made on the account, or by objecting to the claim, if a claim is lodged in bankruptcy, to challenge the items of the account; and if any of the items are irrecoverable for illegality, no such certificate will render the cautioners liable for these items.<sup>9</sup>

**385.** In estimating the extent of a cautioner's liability, the precise terms of his obligation are looked to, and any restriction therein indicated will be given effect to against the creditor.<sup>10</sup> Thus a restriction on general words in subsequent clauses may be read out of statements in the

<sup>1</sup> *Stewart v. Forbes*, 1897, 24 R. 1112.

<sup>2</sup> Just. Inst. iii. 21, 5; Dig. 46, 1, 8, 7.

<sup>3</sup> *Calder & Co. v. Cruikshank's Trs.*, 1889, 17 R. 74, at p. 82; *Anderson v. M'Kinnon*, 1876, 3 R. 608.

<sup>4</sup> *Reid v. Lord Ruthven*, 1917, 2 S.L.T. 238; 1918, 2 S.L.T. 8.

<sup>5</sup> *Ackerman v. Ehrensperger*, 1846, 16 M. & W. 99.

<sup>6</sup> *Clark v. Duncan*, 1833, 12 S. 158.

<sup>7</sup> *Grant v. Fenton*, 1853, 15 D. 424; *Colvin v. Buckle*, 1841, 8 M. & W. 680.

<sup>8</sup> *Ex parte Young, In re Kitchen*, 1881, 17 Ch. D. 668, per James L.J. at p. 671; Dickson on Evidence, S. 359. As regards objections taken to the validity of the obligation itself, the cautioner cannot stand in a better position than the principal debtor, *Stair*, i. 17, 9; *United Mutual and Mining Association Co. v. Murray*, 1860, 23 D. 69. As to the rights of the cautioner where by arrangement between the creditor and the principal debtor the amount of the debt is referred to arbitration, see *M'Dougall's Trs. v. Law*, 1864, 3 M. 68.

<sup>9</sup> *Swan v. Bank of Scotland*, 1835, 2 S. & M.L. 67; 1839, 2 D. 78; Bell, Com. i. 382; *Gilmour v. Finnie*, 1831, 9 S. 907; *Smith v. Drummond*, 1829, 7 S. 792.

<sup>10</sup> *Rennie v. Smith's Trs.*, 1866, 4 M. 669.

narrative of the bond which qualify the nature or duration of the principal debtor's engagement;<sup>1</sup> or may arise from a consideration of the nature and purpose of the bond.<sup>2</sup> So, if one becomes cautioner for a person as the holder of a particular office, his liability does not extend beyond the principal debtor's intromissions in that particular office.<sup>3</sup> Similarly a guarantee in general terms for the faithful discharge of the duties of an office, is, as regards time—apart from express words manifesting a contrary intention<sup>4</sup>—co-extensive with the duration of the office.<sup>5</sup> Again, a guarantee is presumed to refer only to future dealings, and will not cover debts incurred prior to the date of the guarantee or past intromissions of the principal debtor, unless the language of the cautioner's obligation clearly includes them.<sup>6</sup> But the question in each case turns on the terms of the guarantee construed in relation to the subject-matter of the principal debtor's obligation and the nature of his responsibility. In a bond of caution for a judicial factor on a trust estate where the cautioner undertook, in words of the future tense, that the factor "shall render just and regular accounts . . . and make payment of whatever sum or sums of money shall be justly due," the cautioner was held liable for the balance of the trust funds due by the factor at the close of his account, although part of the trust funds had been appropriated by the factor prior to the date of the bond.<sup>7</sup> If a guarantee bears to be granted to, or for, a particular person or firm, the liability of the cautioner is limited to the advances made or goods furnished by, or to, the particular person or firm named.<sup>8</sup>

386. Where a guarantee is given to secure the payment of goods sold to the principal, or the repayment of money advanced to the principal, and a certain sum is named as the limit of the cautioner's liability, the effect of this limitation, in the ordinary case, is not to restrict the dealing between the creditor and the principal debtor, but merely to protect the cautioner from being liable beyond the amount named.<sup>9</sup> The limitation, however, may be so expressed as to render it a condition of the cautioner's liability that the dealings between the principal debtor and the creditor, or the creditor's advances to the

<sup>1</sup> *Napier v. Bruce*, 1840, 2 D. 556; *affd.* 1842, 1 Bell's App. 78.

<sup>2</sup> *North of Scotland Banking Co. v. Fleming*, 1882, 10 R. 217.

<sup>3</sup> *Maxwell's Trs. v. Jeffs*, 1862, 24 D. 1181; *Morland v. Sprot*, 1831, 9 S. 478; *University of Glasgow v. Earl of Selkirk*, 1790, Mor. 2104; *Stevenson v. Tweedell*, 1818, Hume, Decisions, 111; *In re Walker*, [1907] 2 Ch. 120.

<sup>4</sup> *Oswald v. Berwick Corporation*, 1856, 5 H.L. Cas. 856.

<sup>5</sup> *Peppin v. Cooper*, 1819, 2 B. & Ald. 431; *Bamford v. Iles*, 1849, 3 Exch. 380; *Cambridge Corporation v. Dennis*, 1858, E.B. & E. 660. As to the effect in a question with the cautioner of alterations in the contract between the creditor and debtor, see *infra*, para. 417.

<sup>6</sup> Bell, Prin., ss. 282, 285, 289; *Dykes v. Watson*, 1825, 4 S. 69; *Paterson v. Bonar*, 1844, 6 D. 987, at p. 995.

<sup>7</sup> *Wallace's Factor v. M'Kissock*, 1898, 25 R. 642; *Grant v. Kennedy*, 1828, 6 S. 982; *Mags. of Edinburgh v. Gardiner*, 1766, Hume, Decisions, 169.

<sup>8</sup> *Stewart v. Scott*, 1803, Hume, 91; *Bowie v. Watson*, 1840, 2 D. 1061; *Philip v. Melville*, 21st February 1809, F.C.; *Montefiore v. Lloyd*, 1863, 15 C.B. N.S. 203.

<sup>9</sup> Bell, Prin., s. 285; cf. *Tennant & Co. v. Buntin*, 1859, 21 D. 631; *Laurie v. Scholefield*, 1869, L.R. 4 C.P. 622.



principal debtor, shall not exceed the limit named; and if this appears to be the intention of the parties, the cautioner's obligation will be void if the purchases or advances go beyond the limit.<sup>1</sup> When a guarantee specifies a sum as the pecuniary limit to the cautioner's liability, and the principal debtor incurs a debt beyond this limit, it depends on the terms of the guarantee whether it renders the cautioner liable to pay the whole debt due by the principal debtor to the creditor, subject to a limitation that he should not be called upon to pay more than the sum specified in the guarantee, or whether it renders him liable for that part only of the debt due by the principal debtor which is co-extensive with the limit specified in the guarantee.<sup>2</sup> If, in such a case, the guarantee is intended to secure a floating balance, which may in future be due by the principal debtor to the creditor, the guarantee is *prima facie* to be construed as rendering the cautioner liable only for that part of the debt which is equal to the amount specified in the guarantee; and if the cautioner pays that amount he has paid the full amount of the debt which he guaranteed.<sup>3</sup> Where the guarantee is given for a debt already incurred, it is in each case a question of construction whether the intention was to guarantee the whole debt, subject to the limit as to the amount the cautioner can be called upon to pay, or to guarantee a part of the debt only.

#### SECTION 10.—CONTINUING AND SPECIFIC GUARANTEES.

**387.** A question frequently arises as to whether a guarantee is restricted to a particular transaction or set of transactions, or applies to a series of advances or transactions, which may from time to time be entered into between the creditor and the principal debtor. If the undertaking of the cautioner covers a course of dealings to be carried on from time to time, to which—though a limit may be set in point of amount—no limit of time is set, either expressly or by implication, it is a standing or continuing guarantee, and the cautioner is liable for any balance which may ultimately be due by the principal debtor to the creditor. Where, on the other hand, a particular transaction or definite set of transactions is pointed out, or where the liability of the guarantor is definitely limited to a specified time, it is a limited or non-continuing guarantee, and payments made by the principal debtor to the creditor after the particular transactions referred to, or after the expiry of the specified time, go to reduce the cautioner's liability to the extent of these payments.

<sup>1</sup> *Kinross v. Clelland*, 1677, 3 Bro. Supp. 212.

<sup>2</sup> *Veitch v. National Bank of Scotland*, 1907 S.C. 554; *Harmer & Co. v. Gibb*, 1911 S.C. 1341.

<sup>3</sup> *Veitch v. National Bank of Scotland*, *supra*; *Harmer & Co. v. Gibb*, *supra*; *Hobson v. Bass*, 1871, L.R. 6 Ch. 792. But the terms of the guarantee may shew a contrary intention (*Harvie's Trs. v. Bank of Scotland*, 1885, 12 R. 1141; *Ellis v. Emmanuel*, 1887, 1 Ex. D. 157; *In re Sass, Ex parte National Provincial Bank of England*, [1896] 2 Q.B. 12).



**388.** In determining to which category any given guarantee belongs, not much assistance is to be derived from precedents; for, though there have been many cases turning on this distinction, each case is necessarily to a large degree special, being decided not only upon the actual words used, but also largely on the circumstances in which they were used.<sup>1</sup> The mere fact that a guarantee bears to be for a fixed sum does not make the guarantee limited in the sense of being applicable only to a particular transaction or set of transactions.<sup>2</sup> In cash-credit bonds, for example, the liability is limited in amount, and yet such bonds are continuing guarantees, *i.e.* they cover to the extent named the balance ultimately due by the principal debtor. The course of dealing between the creditor and the principal debtor, with reference to which the guarantee was given, and which the guarantor is presumed to know, is an important element in determining whether a guarantee is continuing or limited.<sup>3</sup> Where a guarantee has reference to a current account, or is given in connection with a course of dealing or trade, which in its nature goes on for a length of time, it will readily be construed as continuing.<sup>4</sup> The employment of the word "any" in the guarantee points strongly to the guarantee being continuing.<sup>5</sup> Yet, in several Scots cases, guarantees, in spite of the occurrence of the word "any," have been held to be limited.<sup>6</sup>

#### SECTION 11.—RIGHTS AND PRIVILEGES OF CAUTIONERS.

**389.** At common law cautioners have certain rights and privileges. Of these, the right of discussion belonged, and the right of division belongs, only to cautioners in a proper cautionry; while the right of total relief against the principal debtor, and the right of mutual relief or contribution among themselves, belong to all cautioners, whether bound in proper or improper cautionry.

##### SUBSECTION (1).—*Beneficium ordinis, or Benefit of Discussion.*

**390.** Formerly cautioners bound in a proper cautionry had what was known as the benefit of discussion, or the *beneficium ordinis*, in virtue of which they were entitled to insist that the creditor, before using diligence against them for the debt, should do his best to compel

<sup>1</sup> See per Lord Justice-Clerk Inglis in *Caledonian Banking Co. v. Kennedy's Trs.*, 1870, 8 M. 862.

<sup>2</sup> *Barr v. Downie*, 1840, 3 D. 59.

<sup>3</sup> *Calder & Co. v. Cruikshank's Trs.*, 1889, 17 R. 74.

<sup>4</sup> *Forbes v. Dundas*, 1830, 8 S. 865; *Caledonian Banking Co. v. Kennedy's Trs.*, *supra*; *Laurie v. Scholefield*, 1869, L.R. 4 C.P. 622; *Nottingham Hide, Skin, and Fat Market Co. v. Bottrill*, 1873, L.R. 8 C.P. 694.

<sup>5</sup> Bell, *Prin.*, s. 284.

<sup>6</sup> *Baird v. Corbett*, 1835, 14 S. 41; *Slade v. Black & Knox*, 1808, Hume, Decisions, 95; see also *Scott v. Mitchell*, 1866, 1 M. 551. As to whether a guarantee undertaken in the form of a bill of exchange or promissory note is limited or continuing, see *British Linen Co. v. Thomson*, 1853, 15 D. 314; *Lang v. Brown*, 1859, 22 D. 113; *Jackson v. M'Iver*, 1875, 2 R. 882.

the principal debtor to perform his obligation. In other words, the creditor in a proper cautionry was bound, in the first instance, to "discuss" the obligant, whose proper debt it was, and to give the cautioners the full benefit and relief that could be derived from the principal debtor's estate.<sup>1</sup> He must proceed to do diligence both against the debtor's person and against his estate.<sup>2</sup> The bankruptcy of the principal debtor, however, was in itself sufficient discussion.<sup>3</sup> The benefit of discussion was strictly confined to persons bound simply as cautioners in proper cautionary obligations. Where the cautioners were bound as co-principals, although the term "cautioner" or "guarantee" was used in the bond, the creditor had it in his power to proceed at once against all or any of the obligants, as he chose.<sup>4</sup> Further, discussion had no place in judicial cautionry, or in caution given in a suspension or advocacy, or for loosing of arrestments.<sup>5</sup> The privilege of discussion has been to a great extent taken away by s. 6 of the Mercantile Law Amendment Act, 1856,<sup>6</sup> which provides that "Where any person shall become bound as cautioner for any principal debtor, it shall not be necessary for the creditor, to whom such cautionary obligation shall be granted, before calling on the cautioner for payment of the debt to which such cautionary obligation refers, to discuss or do diligence against the principal debtor, as now required by law; but it shall be competent to such creditor to proceed against the principal debtor and the said cautioner, or against either of them and to use all action or diligence against both or either of them which is competent according to the law of Scotland: Provided always that nothing herein contained shall prevent any cautioner from stipulating in the instrument of caution that the creditor shall be bound, before proceeding against him, to discuss and do diligence against the principal debtor."

391. This enactment does not render a cautioner answerable unless and until there has been default on the part of the principal debtor. But, in virtue of this enactment, in any form of cautionary obligation, immediately upon the default of the principal debtor—as, for example, in the case of a debt payable on demand, something in the way of demand on the principal debtor,<sup>7</sup> or, in the case of a debt payable on a fixed date, the expiry of the period of payment, without payment having been made—the creditor may now proceed directly against the cautioner without being bound first to do diligence against the principal debtor, or even to bring an action against him.<sup>8</sup> Where the ground of debt is

<sup>1</sup> Bell, Com. i. 364; Ersk. iii. 3, 61.

<sup>2</sup> Stair, i. 17, 4 and 5; Ersk. Inst. iii. 3, 61; Bell, Prin., ss. 252, 253.

<sup>3</sup> Bell, Com. i. 368; *Galloway v. Robertson*, 1825, 4 S. (N.E.) 134.

<sup>4</sup> *Traquair v. Burrows*, 1815, 6 Pat. App. 99.

<sup>5</sup> *Blackwood v. Forbes*, 1848, 10 D. 920.

<sup>6</sup> 19 & 20 Vict. c. 60.

<sup>7</sup> Where the debt is payable on demand, no money can be considered payable by the surety and no right of action accrues against him until a demand for payment has been made (*Bradford Old Bank v. Sutcliffe*, [1918] 2 K.B. 833).

<sup>8</sup> *Morrison v. Harkness*, 1870, 9 M. 35, *vide per* Lord Justice-Clerk Moncreiff.

not liquid, the debt must be constituted; but it would appear to be no longer necessary for the creditor, before proceeding against a cautioner, to constitute the debt against the principal debtor in a separate action.<sup>1</sup>

**392.** It is in each case a question of fact whether the principal debtor is in default, or, in other words, whether he has failed to perform his obligation.<sup>2</sup> In an ordinary cautionary obligation for the payment of money the creditor is not bound to give notice to the cautioner that the principal debtor has failed to pay the sum when it fell due.<sup>3</sup> A question has arisen whether, when a guarantee has been given for the due performance of a contract, it is competent, in Scotland, in an action brought to establish that the principal debtor has failed to execute his contract, to sue also the cautioners under their guarantee. In *Municipal Council of Johannesburg v. D. Stewart & Co., Ltd.*,<sup>4</sup> a bond, in English form, guaranteeing the performance of a contract to supply engineering plant by a Scottish firm was granted by persons who, on the face of the documents, were plainly sureties. The creditor brought an action of damages against the firm for breach of the contract, and, in that action, also sued the sureties for the full sum contained in their bond. In the Court of Session the conclusions against the sureties were dismissed as premature, and it was observed by Lord M'Laren that "until the failure" of the principals "is established by competent process, either in a Court of law or in a Court of arbitration, no claim arises against the surety." In the House of Lords it was held that under English law, by which the bond fell to be construed, the action was competently laid against the sureties. Lord Shaw, referring to the above-quoted observation of Lord M'Laren, intimated that, as regards the Scots law on the matter, he could have no part in such an affirmation and must reserve his opinion.

<sup>1</sup> *Morrison v. Harkness*, *supra*; *Sheldon & Ackoff v. Milligan*, 1907, 14 S.L.T. 703. Where an action is brought to constitute the debt against the principal debtor, the cautioner is entitled to see that everything is done regularly and that no competent defence is omitted; *Ross v. Mackenzie*, 25th June 1840, F.C.; *Ross v. Mackenzie*, 1842, 15 Sc. Jur. 34, 5 D. 151.

<sup>2</sup> *Laird v. Securities Insurance Co.*, 1895, 22 R. 452, at p. 461; *Willison v. Ferguson*, 1901, 9 S.L.T. 169; *Ewart v. Latta*, 1865, 3 M. (H.L.) 36. In England, as soon as facts have occurred which shew a default on the part of the principal debtor, a cause of action accrues against the surety, and it is not necessary for the creditor to establish in a separate action against the principal debtor the fact of default or the amount of damage before proceeding against the surety; *Colin v. Buckle*, 1841, 8 M. & W. 680; *Wright v. Simpson*, 1802, 6 Ves. 714, per Lord Eldon at p. 734; *Municipal Council of Johannesburg v. D. Stewart & Co. (1902), Ltd.*, 1909 S.C. (H.L.) 53 at pp. 55 and 59.

<sup>3</sup> *Britannia Steamship Insurance Association, Ltd. v. Duff*, 1909 S.C. 1261, at pp. 1270-1271. It is the surety's business to see that the principal debtor pays. It may, of course, be specially stipulated that notice of default be given to a cautioner. Where, in a guarantee that contractors would fulfil their obligations under an executory contract, it was stipulated as a condition precedent to the right of the employer to recover under the guarantee, that notice be given to the cautioner of any non-observance by the firm of contractors of the provisions of the principal contract which might involve a loss for which the cautioner was responsible, the failure of the employer to give the cautioner notice of such non-observance by the contractor during the progress of the work liberated the cautioner (*Clydebank and District Water Trs. v. Fidelity and Deposit Co. of Maryland*, 1915 S.C. 362, 1916 S.C. (H.L.) 69).

<sup>4</sup> 1909 S.C. 860; 1909 S.C. (H.L.) 53.



SUBSECTION (2).—*Beneficium divisionis, or Benefit of Division.*

**393.** Where several cautioners are bound conjunctly for the debtor in a proper cautionary obligation, each of the cautioners—if the obligation is divisible, as for a sum of money—is, in the first instance and so long as his co-cautioners are solvent, liable only for his own *pro rata* share of the debt.<sup>1</sup> On the other hand, cautioners who are bound in an improper cautionary obligation, that is, who are bound as full debtors, or conjunctly and severally with the debtor, do not possess the right of division, with the result that the creditor may, on the arrival of the date of payment, at once go against any one of the obligants for the whole debt, or against several of them in such proportions as he pleases.<sup>2</sup>

SUBSECTION (3).—*Right to Total Relief against the Principal Debtor.*

**394.** A cautioner who has paid the debt, or any portion of the debt, has a right to relief and indemnification against the principal debtor to the full extent to which he has been made answerable for him. The obligation of the principal debtor to relieve the cautioner extends not only to the amount which the cautioner has actually paid to the creditor, with interest thereon,<sup>3</sup> but also to any expense incurred by the cautioner in defending an action for the debt, provided the defence maintained was a proper and reasonable one.<sup>4</sup> Also, if a surety can prove that by reason of the non-payment of the debt he has suffered damage beyond the principal and interest which he has been compelled to pay, he will be entitled to recover that damage from the principal debtor.<sup>5</sup> In such damage are included all reasonable expenses legitimately incurred by the cautioner in consequence of the principal debtor's default, or for his own protection,<sup>6</sup> but not loss sustained through his own fault, *e.g.* in suspending the creditor's charge upon frivolous grounds or allowing diligence to proceed on it against his estate.<sup>7</sup>

**395.** The right of a cautioner to total relief against the principal debtor rests on two distinct principles. *Firstly*, as the implied mandator of the principal debtor, the cautioner has the right, as by an *actio mandati*, to take legal measures for his relief against the principal. On this principle, the cautioner, on being sued by the creditor for the debt, or on the creditor taking other legal steps against him for obtaining payment, can, before making an actual payment, sue the principal

<sup>1</sup> Ersk. iii. 3, 63; Bell, Prin., s. 267.    <sup>2</sup> *Richmond v. Grahame and Ors.*, 1847, 9 D. 633.

<sup>3</sup> *Petre v. Duncombe*, 1851, 20 L.J. Q.B. 242; *In re Watson, Turner v. Watson*, [1896] 1 Ch. 925.

<sup>4</sup> *Hannay v. Miller*, 1840, 16 Fac. Dec. 42; *Fraser v. Burnetson*, 28th January 1831, F.C.; cf. *Dougall v. Mags. of Dunfermline*, 1908 S.C. 151, as to expenses claimable in respect of a general right of indemnification.

<sup>5</sup> Ersk. Inst. iii. 3, 65; *Badeley v. Consolidated Bank*, 1886, 34 Ch. D. 536, per Stirling J. at p. 556.

<sup>6</sup> *Inglis & Weir v. Renny*, 1825, 4 S. 113; *Hutchison v. Stevenson*, 1833, 11 S. 429.

<sup>7</sup> Ersk. Inst. iii. 3, 65; iii. 3, 86.



debtor for relief.<sup>1</sup> If the principal debtor is *vergens ad inopiam*, the cautioner, though the term of payment has not arrived, may take precautionary measures, *e.g.* by attaching the goods of the principal debtor or retaining funds belonging to him.<sup>2</sup> Even though the creditor has not actually applied to the cautioner for payment, the cautioner has a right, as soon as a definite sum has become due to the creditor by the principal debtor, to have the sum paid by the principal debtor and his own liability in respect of it brought to an end. He may himself pay the sum due to the creditor and proceed against the principal debtor for the money so paid;<sup>3</sup> and in England he may obtain an order from the Court directing the principal debtor to pay such sum to the creditor.<sup>4</sup> A cautioner who chooses to pay the principal debt, or part of it, before the date when it is actually due cannot, in the absence of special agreement, enforce a claim for immediate relief.<sup>5</sup> Further, a cautioner in a guarantee, which is undertaken for an indefinite period until it is recalled, is entitled, after due notice of revocation, to be relieved from the liability already attaching to it. If the principal debtor does not within a reasonable time relieve the cautioner he may be ordained by the Court to pay the creditor what is due under the guarantee, or to obtain from the creditor a discharge of the cautioner's liability.<sup>6</sup> But if the cautioner's obligation is for a fixed period and he has neither made any payment, nor is threatened with distress nor is able to shew that the principal debtor is *vergens ad inopiam*, he cannot compel the principal debtor to relieve him.<sup>7</sup> Secondly, as regards the creditor, the right of relief rests on the principle of the *beneficium cedendarum actionum*, under which the cautioner, on paying the debt, is entitled to require the creditor to communicate the full benefit of his contract.<sup>8</sup> In virtue of this privilege, a paying cautioner is put for all purposes in the place of the creditor, as regards both the principal debtor and the other cautioners. Accordingly, not only does there pass to the paying cautioner a right to sue the principal debtor for relief, but he is entitled to demand from the creditor an assignation of the debt, of any available diligence or remedy, and of all securities held by the creditor over the estate of the debtor.<sup>9</sup> The right of the cautioner to securities held by the creditor for the debt is based on the principle that such securi-

<sup>1</sup> Ersk. iii. 3, 65; *Cunningham v. Montgomerie*, 1879, 6 R. 1333, per Lord Pres. Inglis and Lord Deas; *Scott v. Grahame*, 1830, 8 S. 749.

<sup>2</sup> Ersk. iii. 3, 65; *Kinloch v. M'Intosh*, 1822, 1 S. 491; *M'Pherson v. Wright*, 1885, 12 R. 942; *Brodie v. Wilson*, 1837, 15 S. 1195.

<sup>3</sup> *Gray v. Thomson*, 1847, 10 D. 145.

<sup>4</sup> *Bechervaise v. Lewis*, 1872, L.R. 7 C.P. 372, per Willes J. at p. 377; *In re Giles, Jones v. Pennifather*, [1896] 1 Ch. 956; *Ascherson v. Tredgar Dock Co.*, [1909] 2 Ch. 401. But see *Bradford v. Gammon*, [1925] 1 Ch. 132. A case in which the creditor had made no demand for payment.

<sup>5</sup> *Owen v. Bryson*, 1833, 12 S. 130; *Bradford v. Gammon*, *supra*.

<sup>6</sup> *Doig v. Lawrie*, 1903, 5 F. 295; *Gray v. Phillips*, 1905, 13 S.L.T. 145.

<sup>7</sup> *Spence v. Brownlee*, 1834, 13 S. 199.

<sup>8</sup> Bell, Prin., s. 255.

<sup>9</sup> Bell, Prin., s. 225; *Erskine v. Manderson*, 1780, Mor. 1386; *Lowe v. Greig*, 1825, 3 S. 543; *Thow's Tr. v. Young*, 1910 S.C. 588, *vide per* Lord Dunedin at p. 596.

ties constitute a remedy available to the creditor to liquidate the debt at the expense of the principal debtor, and that it would be inequitable that the creditor, by not resorting to the remedy in his power, should throw the whole burden on the cautioner.<sup>1</sup> The principle is based on equity and is admitted in every system of jurisprudence.<sup>2</sup> In certain circumstances it is advisable for the cautioner to obtain a formal assignation from the creditor of rights or securities held by him;<sup>3</sup> but while an assignation is a useful piece of machinery, it does not alter the substantial rights of the parties.<sup>4</sup> The cautioner who pays the debt has a valid claim to the benefit of securities held by the creditor for the payment of the principal debt, though at the date of his becoming cautioner, he did not know of the existence of these securities,<sup>5</sup> or though these securities did not come into existence until after the cautioner's obligation had been contracted.<sup>6</sup> In order, however, to entitle a cautioner to claim a cession of securities, he must pay in full the debt due, and the payment of a dividend on his bankrupt estate is not full payment to this effect.<sup>7</sup> The right of a cautioner on payment to relief out of securities held by the creditor is not affected by the creditor making subsequent advances on those securities.<sup>8</sup> From this right of the cautioner to total relief against the principal debtor, and to a cession of all securities for the debt held by the creditor, there arises on the part of the creditor a duty to preserve intact all his remedies against the principal debtor, as well as to see that the securities held by him for the debt are not lost or abandoned.<sup>9</sup>

SUBSECTION (4).—*Right of Mutual Relief or Contribution in a Question with Co-cautioners.*

**396.** All cautioners, whether bound in a proper or an improper cautionary obligation, are, in a question with co-cautioners, ultimately liable only for their *pro rata* share of the debt. Accordingly, where any cautioner, on default of the principal debtor, has paid a share of the debt greater than his proportionate share, he forthwith becomes entitled to claim from each of the others a rateable contribution to recoup himself for the excess which he has paid beyond his own share.<sup>10</sup>

<sup>1</sup> Dig. 46, i. 13; Cod. 8, 41, 2, 21.

<sup>2</sup> *Vide per* Lord Dunedin in *Thow's Tr. v. Young, supra*. In England the principle has been declared by statute—Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 5. This enactment—which in some respects extended the principle as applied at common law—in effect assimilates the law of England to that of Scotland.

<sup>3</sup> Cf. *Garden v. Gregory*, 1735, Mor. 3390; *Brown v. Doctor*, 1852, 1 Stuart 269.

<sup>4</sup> *Inglis & Weir v. Renny*, 1825, 4 S. 113; *Thow's Tr. v. Young*, 1910 S.C. 588, at p. 595.

<sup>5</sup> *Duncan, Fox & Co. v. North and South Wales Bank*, 1880, 6 App. Cas. 1.

<sup>6</sup> *Forbes v. Jackson*, 1882, 19 Ch. D. 615, at p. 621.

<sup>7</sup> *Ewart v. Latta*, 1865, 3 M. (H.L.) 36.

<sup>8</sup> *Sligo v. Menzies*, 1840, 2 D. 1478; *Sandeman v. Shepherd*, 1837, 15 S. 416; *Forbes v. Jackson*, 1882, 19 Ch. D. 615; *Holme v. Brunskill*, 1878, 3 Q.B.D. 495, per Collins L.J., approved in *Ward v. National Bank of New Zealand*, 1883, 8 App. Cas. 755, at p. 764; *Nicholas v. Ridley*, [1906] 1 Ch. 192, at p. 197.

<sup>9</sup> *Vide infra*, para. 428.

<sup>10</sup> *Stair*, i. 8, 9; *Bell, Com. i. 368 et seq.*; *Kames, Prin. of Equity*, B. 1, p. 1, s. 3.

This right of contribution depends not on contract but on a rule of law based upon an equity arising out of the mere fact that the parties are cautioners for the same principal debt.<sup>1</sup> The claim of a cautioner for contribution from his co-cautioners does not arise until he has paid more than his proportion of the debt ascertained to be actually due to the creditor.<sup>2</sup> When all the cautioners are solvent, the proportion payable by each of them is determined by the number of cautioners.<sup>3</sup> But this holds only as long as they are all solvent; for when some of the cautioners are insolvent, the proportion payable by each of the solvent cautioners is determined *inter se* by the number of the solvent cautioners.<sup>4</sup> Further, where five cautioners were bound jointly and severally, and two of them had paid the whole amount due, it was held that these two had an action of relief against a solvent co-cautioner for one-third of the sum they had paid, although the defender denied that the remaining two cautioners were insolvent—the Court taking the view that, as the solvency of the remaining two cautioners was doubtful, the pursuers were not bound to take the whole risk of their insolvency.<sup>5</sup> Where one of two cautioners for the performance of an executory contract, on the failure of the contractor to perform the contract, completed the contract with the consent of the creditor and after notice to his co-cautioner, it was held—it being proved that his intervention had lessened the loss which would otherwise have accrued from the failure of the principal—that he was entitled to recover from his co-cautioner one-half of the loss incurred by him in completing the contract, including in such loss a fee in respect of his personal supervision of the work.<sup>6</sup>

397. A cautioner is not entitled to recover any sum as contribution from co-cautioners until he has paid to the creditor a sum in excess of his *pro rata* share of the debt then actually due to the creditor by the principal debtor.<sup>7</sup> But a cautioner who is threatened with diligence for the whole debt, or a part of it greater than his *pro rata* share, may bring an action concluding to have his co-cautioners ordained to pay their proportions.<sup>8</sup> A cautioner who has paid more than his share of what is then actually due to the creditor cannot insist on contribution

<sup>1</sup> *Stirling v. Forrester*, 1825, 3 Bligh 575, per Lord Redesdale at 590 and 596, where the principle established in *Dering v. Lord Winchelsea*, 2 White & Tudor's Leading Cases (8th ed.), p. 539, was recognised as equally a principle of Scots law; *Ward v. National Bank of New Zealand*, 1883, 8 App. Cas. 755, at p. 765; *Thow's Tr. v. Young*, 1910 S.C. 588, per Lord Pres. Dunedin at p. 596; *Union Bank of Scotland v. Taylor*, 1925 S.C. 835, per Lord Pres. Clyde at p. 841. The principle of contribution applies wherever, in the words of Stair (i. 8, 9), "many persons are obliged *in solidum* and are thereby liable conjunctly and severally."

<sup>2</sup> *Cranstoun v. M'Dowal*, 1798, Mor. 2552; *Alston v. Denniston & Co.*, 1828, 7 S. 112.

<sup>3</sup> As to cases in which the respective liabilities of the cautioners are limited to specified amounts, *vide infra*, para. 398.

<sup>4</sup> Ersk. iii. 3, 74; Bell, Com. i. 372; *Anderson v. Dayton*, 1884, 21 S.L.R. 787.

<sup>5</sup> *Buchanan v. Main*, 1900, 3 F. 215. <sup>6</sup> *Marshall & Co. v. Pennycook*, 1908 S.C. 276.

<sup>7</sup> *Alston v. Denniston & Co.*, 1828, 7 S. 112; *In re Snowden, Ex parte Snowden*, 1881, 17 Ch. D. 44; *Davies v. Humphreys*, 1840, 6 M. & W. 153.

<sup>8</sup> *Low v. Farquharson*, 1831, 9 S. 411; *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *Ex parte Snowden*, 1881, 17 Ch. D. 44, per James L.J.



from his co-cautioners if a larger sum for which the same cautioners are liable may become due afterwards.<sup>1</sup> A cautioner's claim of relief against co-cautioners extends to interest on the money paid by him in excess of his *pro rata* share, from the date of such excess payment.<sup>2</sup> A cautioner who voluntarily makes a payment—as, for instance, of a fee to an arbiter—which he was not under a legal obligation to pay, though he may have been morally bound to do so, cannot claim contribution from a co-cautioner in respect of that payment.<sup>3</sup>

**398.** The principle of mutual relief among co-sureties is equally applicable whether the sureties are bound in the same or in different instruments, and whether those bound in one instrument knew, or did not know, of the other instruments, provided all the instruments are, as a matter of fact, primary concurrent securities for the same debt.<sup>4</sup> The criterion which determines whether or not parties are co-sureties for the purpose of mutual relief or contribution, is simply whether the same default of the principal debtor makes them all responsible for the debt.<sup>5</sup> Where a number of cautioners, by one or different deeds, become bound each for the whole debt, but with the amounts of their respective liabilities limited to specified sums, the principle of contribution is applied in such a way that the ultimate burden is borne by the cautioners, not equally, but in proportion to the respective amounts to which their liabilities are limited.<sup>6</sup> Where, however, cautioners are bound in separate instruments for different debts of the same principal debtor to the same creditor, or for separate parts of a debt, which, as between the principal debtor and the creditor, is undivided, but which, as between the cautioners, is split up into distinct parts, so that the obligation of each cautioner is separate from, and independent of, that of the other cautioners, there is no right of mutual relief or contribution.<sup>7</sup> Nor does the principle of contribution apply in the case of a person who, under his obligation to the creditor, is not liable to the creditor concurrently with the cautioners, but is liable only on the default of the cautioners, so that he is only a cautioner for the other cautioners.<sup>8</sup> If a cautioner, on paying the debt, demands an assignation, the creditor is bound to grant it; <sup>9</sup> and, although no assignation by the creditor is necessary to

<sup>1</sup> *Stirling v. Burdett*, [1911] 2 Ch. 418.

<sup>2</sup> *Ex parte Bishop*, 1880, 15 Ch. D. 400.

<sup>3</sup> *Henderson v. Paul*, 1867, 5 M. 628.

<sup>4</sup> *Stirling v. Forrester*, 1825, 3 Bligh 575; *M'Phersons v. Haggarts*, 1881, 9 R. 306; *M'Donald v. Whitfield*, 1883, 8 App. Cas. 733.

<sup>5</sup> See per Alderson B. in *Pendlebury v. Walker*, 1841, 4 Y. & C. (Ex.) 441; approved by Fry J. in *Steel v. Dixon*, 1881, 17 Ch. D. 825, and by Pearson J. in *In re Arcedeckne*, *Atkins v. Arcedeckne*, 1883, 24 Ch. D. 709.

<sup>6</sup> *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q.B. 75; *Stirling v. Burdett*, [1911] 2 Ch. 418; Bell, Com. i. 367; *Pendlebury v. Walker*, 1841, 4 Y. & C. 424.

<sup>7</sup> *Pendlebury v. Walker*, *supra*; *Coope v. Twynam*, 1823, White & Tudor, L.C. Eq. (8th ed.), ii. 539; cf. *Morgan v. Smart*, 1872, 10 M. 610; *Union Bank of Scotland v. Taylor*, 1925 S.C. 835 at p. 841.

<sup>8</sup> *Craythorne v. Swinburne*, 1807, 14 Ves. 160; *Thow's Tr. v. Young*, 1910 S.C. 588; *In re Denton*, [1904] 2 Ch. 178.

<sup>9</sup> *Gilmour v. Finnie*, 1832, 11 S. 193.



enable the cautioner to enforce his right to contribution,<sup>1</sup> it is in many cases an advantage to take such an assignation.<sup>2</sup>

**399.** On the principle that the ultimate burden which the cautioners have to bear falls to be distributed between them equally or proportionally, the cautioner who pays the debt, or more than his share of the debt, has a right to participate in any security, ease, or relief which may have been obtained by any of his co-cautioners from the principal debtor.<sup>3</sup> Accordingly, if a cautioner receives any payment from the principal, or discount from the creditor, he is bound to give the other cautioners the benefit of it *pro rata* in relief of their contributions. So a cautioner who has received any security from the principal, even though the co-cautioners did not know of it, and even though the favoured cautioner consented to become cautioner only on condition of having the security, is bound, as between himself and his co-cautioners, to bring it into hotch-pot.<sup>4</sup> Cautioners, however, may, by agreement with a co-cautioner, contract themselves out of the benefit which is thus conferred on them by the common law; and such an agreement may be competently proved by oral evidence.<sup>5</sup> An agreement between the principal debtor and one of the cautioners that a security be given by the principal debtor to that cautioner for his sole benefit is ineffectual to deprive the other cautioners of their right to share in the security, unless it is proved that they knew of the agreement in question, and acquiesced in it.<sup>6</sup>

**400.** The claim of a cautioner to participate in a security held by a co-cautioner does not extend to a security obtained, not from the principal debtor, but from a third party.<sup>7</sup> On the same principle, if a surety insures the life of the principal debtor at his own risk and for his own benefit, himself paying the premiums, a co-surety cannot compel him to deliver up the policy.<sup>8</sup>

## SECTION 12.—RIGHTS OF CREDITOR AND CAUTIONERS IN BANKRUPTCY.

### SUBSECTION (1).—*Bankruptcy of Cautioner, the Principal Debtor and the other Cautioners being Solvent.*

**401.** If, when the debt is exigible, one of the cautioners is bankrupt, while the principal debtor and the other cautioners are solvent, the creditor may, if he choose, rank on the estate of the bankrupt cautioner for the full amount of the debt actually due at the date of the bankruptcy,

<sup>1</sup> Bell, Prin., s. 62; *Finlayson v. Smith*, 1827, 6 S. 264; cf. *Graham v. Tait*, 1885, 12 R. 588.

<sup>2</sup> *Erskine v. Cormack*, 1842, 4 D. 1478, per Lord Fullerton at p. 1480.

<sup>3</sup> Ersk. iii. 3, 70; Bell, Com. i. 367; *Cowan v. Thom*, 1802, Hume, 85.

<sup>4</sup> *Milligan v. Glen*, 20th May 1802, F.C.; *Steel v. Dixon*, 1881, 17 Ch. D. 825; *In re Arcedeckne*, 1883, 24 Ch. D. 709; *Berridge v. Berridge*, 1890, 44 Ch. D. 168.

<sup>5</sup> *Hamilton & Co. v. Freeth*, 1889, 16 R. 1022.

<sup>6</sup> Bell, Com. i. 367; *Murray v. Miller*, 1832, 10 S. 706, reported *sub nom. Murray's Tr. v. Ducat's Tr.*, 1832, 7 Fac. Dec. 547; *In re Ennis, Coles v. Peyton*, [1893] 3 Ch. 238.

<sup>7</sup> *Coventry v. Hutchison*, 1830, 8 S. 924; *Scott v. Young*, 1909, 1 S.L.T. 47.

<sup>8</sup> *In re Arcedeckne*, 1883, 24 Ch. D. 709, at pp. 716, 717.

where the cautioners were bound *singuli in solidum*, or for the bankrupt cautioner's *pro rata* share where the cautioners were bound simply as cautioners in a proper cautionary obligation. In both cases, of course, the estate of the bankrupt cautioner has total relief for what is paid from the solvent principal debtor. The creditor can rank for the full amount due by the principal debtor<sup>1</sup> at the date of the cautioner's bankruptcy without making over to the bankrupt estate securities held by him; for the right of a cautioner to such securities arises only on payment in full.<sup>2</sup> A creditor who had received a security from some of several sureties was held entitled to prove for the full amount of the debt against the bankrupt estate of another surety, although the security was a deposit of money which was carried to a suspense account and which the creditor was at liberty at any time to appropriate to the payment *pro tanto* of the principal debt.<sup>3</sup> If the bankruptcy of the cautioner occurs before the principal debt is exigible, the creditor is similarly entitled to rank on the bankrupt estate of the cautioner as a contingent creditor for the whole debt, or for the bankrupt cautioner's *pro rata* share, according as the cautionary obligation was improper or proper.<sup>4</sup> The effect of such contingent ranking is, that the creditor has a dividend on the cautioner's estate set apart as a security to meet the liability that would accrue to the cautioner upon the failure of the principal debtor to meet the obligation at its maturity.<sup>5</sup>

SUBSECTION (2).—*Bankruptcy of the Principal Debtor, Cautioners being Solvent.*

402. On the bankruptcy of the principal debtor, the creditor may rank for the whole debt on the estate of the principal debtor, and claim from the cautioners the balance of the debt left unpaid by the dividends received from the bankrupt estate; or he may at once demand payment of the whole debt from the solvent cautioners. If he elect to rank, he must deduct the value of any securities held by him from the principal debtor, as well as any partial payments of the debt which he may have received.<sup>6</sup> The date of the sequestration is the date at which the amount of the claim is settled.<sup>7</sup> When the creditor has ranked on the debtor's estate, the cautioners, when they have paid the difference between the dividends received by the creditor and 20s. in the pound of the debt due, cannot also rank on the debtor's estate in relief of what

<sup>1</sup> The creditor cannot rank for a larger amount, even though the sum named in the cautioner's obligation exceeds that amount (*Jackson v. M'Iver*, 1875, 2 R. 882). The cases (e.g. *Stewart v. Forbes*, 1897, 24 R. 1112) in which a cautioner has been held to be liable for an amount in excess of the amount owed by the principal debtor are cases in which the so-called cautioner has, in addition to the cautionary obligation, undertaken an independent obligation as a principal for that excess.

<sup>2</sup> *Ewart v. Latta*, 1865, 3 M. (H.L.) 36.

<sup>3</sup> *Commercial Bank of Australia v. Wilson*, [1893] A.C. 181. <sup>4</sup> Bell, Com. i. 368.

<sup>5</sup> *Garden v. M'Iver*, 1860, 22 D. 1190.

<sup>6</sup> *Hamilton v. Cuthbertson*, 1841, 3 D. 494. <sup>7</sup> *Robertson v. Bank of Scotland*, 1823, 2 S. 450; *Mein v. Sanders*, 1824, 2 S. 778; *Royal Bank of Scotland v. Commercial Bank of Scotland*, 1881, 8 R. 805, at p. 817.

they have paid.<sup>1</sup> To allow them so to rank would be to contravene the rule against the double ranking of the same debt. This rule does not apply to cases where the bankrupt compounds with his creditors without being sequestered or deprived of his estate by a trust deed, but only to cases where the effect of the bankruptcy is to divest the bankrupt of his estate.<sup>2</sup> When cautioners have paid the principal debt in full, whether they do so voluntarily or yield to a demand by the creditor, they forthwith stand in every respect in the place of the creditor, ranking on the bankrupt estate of the principal debtor for the sums they have respectively paid, and taking the full benefit of any securities for the debt held by the creditor from the principal debtor.<sup>3</sup> The whole debt for which the cautioners are liable must be paid before they can be placed in possession of the rights possessed by the creditor against the principal debtor—either his right to rank on the debtor's estate or his right to securities. Till such full payment is made, the creditor remains in the full possession of every remedy competent to him, and is left unfettered as to the mode in which he shall pursue these remedies.<sup>4</sup>

403. Where cautioners undertake a guarantee, limited in amount, and the principal debtor incurs a debt to the creditor beyond the limited amount stated in the guarantee, it depends on the terms of the guarantee whether the cautioners are liable to pay the whole debt due by the principal debtor to the creditor, with merely a limit on the extent of their liability, or whether they are liable only to pay a portion of the debt, limited to the amount stated in the guarantee.<sup>5</sup> In the former case, on the bankruptcy of the principal debtor, the creditor is entitled to enforce payment in full by the cautioners of the limited sum stated in the guarantee, and also is entitled to rank on the debtor's estate for the whole debt due by the debtor, applying the dividends received to the unguaranteed balance. Accordingly, the cautioners have no right to rank in relief until the creditor has received 20s. in the pound on his whole debt. In the latter case, the cautioners, on paying the limited amount stated in the guarantee, have paid the debt guaranteed by them in full, just as if they had guaranteed a separate debt quite distinct from the balance of the creditor's claim, and therefore are entitled to rank in relief on the debtor's estate for the sum so paid.

SUBSECTION (3).—*Principal Debtor and some of the Cautioners Insolvent, while other Cautioners Solvent.*

404. Where, at the maturity of the obligation, the principal debtor and one or more of the cautioners are insolvent, while other cautioners remain solvent, the creditor has two methods open to him of enforcing payment of his debt.<sup>6</sup> On the one hand, he may rank for the whole debt

<sup>1</sup> *Anderson v. Mackinnon*, 1876, 3 R. 608.      <sup>2</sup> *Mackinnon v. Monkhouse*, 1881, 9 R. 293.

<sup>3</sup> *Erskine v. Manderson*, 1780, Mor. 1386; Bell, Com. (M'Laren's ed.), i. 365.

<sup>4</sup> *Ewart v. Latta*, 1865, 3 M. (H.L.) 36, at p. 41.

<sup>5</sup> See *supra*, para. 386.

<sup>6</sup> Bell, Com. i. 371.



upon each of the insolvent estates, and demand from the solvent cautioners any balance remaining due after deducting all the dividends received from the various bankrupt estates.<sup>1</sup> The solvent cautioners must then share this loss between them without further relief, for, where the creditor has ranked, the cautioners cannot also rank on the estates of a bankrupt for the same debt. On the other hand, the creditor may at once demand payment of the debt from the solvent cautioners, leaving them to work out their relief as best they may from the bankrupt estates of the principal debtor and their insolvent co-cautioners. If the solvent cautioners are thus forced to pay, they may of course rank on the estate of the principal debtor for the whole sum which they have respectively paid; but they cannot rank upon the estate of any one of the insolvent co-cautioners for more than the excess beyond their *pro rata* share, which they have been compelled to pay owing to the insolvency of these obligants.<sup>2</sup> It is therefore to the advantage of the solvent cautioners that the creditor should rank on the estates of his insolvent obligants, as in this way, his ranking being for the whole debt upon each estate, a larger sum in dividends is obtained; and, in practice, this is the usual arrangement.<sup>3</sup>

SUBSECTION (4).—*Principal Debtor and all the Cautioners Insolvent.*

405. Where the principal debtor and the cautioners are all insolvent, the creditor is entitled, where all are bound as co-obligants, to rank on the estate of each obligant for the full amount of the debt to the effect of obtaining thereby full payment. Payments to account, or recoveries from any source, made before bankruptcy must be deducted; but payments or recoveries from any source after bankruptcy are not deducted, except only the produce or value of any security held by the creditor before bankruptcy over the estate of the bankrupt.<sup>4</sup> As the creditor can only rank on the estate of any particular obligant for the amount of the debt as it stood at the date of that obligant's bankruptcy, it is expedient from the point of view of the creditor that, where it is possible, claims should be made on the estates of all the bankrupt obligants before the amount of the debt is diminished by the payment of a dividend on the estate of any of them.<sup>5</sup> Where the creditor has ranked upon each estate for the whole debt, no estate can be ranked in relief upon any other estate, although the dividends paid by one of the estates exceed the obligant's *pro rata* share. To allow such relief would clearly be to allow a double ranking of the same debt upon the estate which has paid the smaller dividend.<sup>6</sup> While the creditor is entitled to rank on the

<sup>1</sup> *Morton's Trs. v. Robertson's Judicial Factor*, 1892, 20 R. 72, per Lord M'Laren.

<sup>2</sup> Bell, Com. i. 373; *Keith v. Forbes* (*Maxwell's Crs. v. Heron's Trs.*), 1792, Mor. 2136; revd. 1794, 3 Pat. 350.

<sup>3</sup> Bell, Com. i. 372.

<sup>4</sup> *Royal Bank of Scotland v. Commercial Bank of Scotland*, 1881, 8 R. 805, per Lord Pres. Inglis at p. 817.

<sup>5</sup> *Hamilton v. Cuthbertson*, 1841, 3 D. 494. <sup>6</sup> *Anderson v. Mackinnon*, 1876, 3 R. 608.



estate of each obligant to the effect of receiving full payment, he is not entitled to receive more than full payment; therefore, if the dividends declared on the estates of the various insolvent obligants together yield more than suffices to pay to the creditor 20s. in the pound of the whole debt, the estate of a co-obligant which has paid more than its share of the debt is entitled, to the extent of this excess, to benefit by the creditor's ranking upon the other estates.<sup>1</sup>

### SECTION 13.—EXTINCTION OF THE CAUTIONER'S LIABILITY.

#### SUBSECTION (1).—*Direct Discharge of Cautioner.*

**406.** A cautioner's obligation may come to an end by his direct discharge, while the principal debtor remains liable.<sup>2</sup>

#### SUBSECTION (2).—*Expiry of Period of Liability.*

**407.** Where the cautioner's liability is limited in point of time, and covers only liabilities contracted within that time, the expiry of the period, without there having occurred any default on the part of the principal debtor, extinguishes the liability of the cautioner. Any question as to the duration of a cautionary obligation, or as to the transactions or liabilities covered by it, falls to be determined on a consideration of the actual terms of the obligation, read as a whole and in the light of the surrounding circumstances.<sup>3</sup>

#### SUBSECTION (3).—*Extinction of Principal Obligation.*

**408.** The extinction of the principal obligation involves the extinction of the accessory obligation.<sup>4</sup> Thus if the creditor allows the principal debt to prescribe, the liability of the cautioner is extinguished.<sup>5</sup> On the same principle the novation of the principal debt operates the extinction of the cautioner's liability.<sup>6</sup> Similarly, if the principal debtor pays his debt, the benefit of the discharge enures to the cautioner.<sup>7</sup> In order, however, that such a payment shall discharge

<sup>1</sup> *Ex parte Stokes*, 1848, De Gex 618; *In re Parker*, [1894] 3 Ch. 400.

<sup>2</sup> Bell, Prin., s. 257.

<sup>3</sup> *Caledonian Banking Co. v. Kennedy's Trs.*, 1870, 8 M. 862, at p. 867; *Britannia Steamship Insurance Association, Ltd. v. Duff*, 1909 S.C. 1261; *supra*, para. 387, *et seq.*

<sup>4</sup> As to cases in which so-called guarantors undertake direct and independent liability, see *supra*, para. 398.

<sup>5</sup> Ersk. iii. 3, 66, see *infra*, para. 101.

<sup>6</sup> *Commercial Bank of Tasmania v. Jones*, [1893] A.C. 313. In order to the discharge of a cautionary obligation by the novation of the principal debt, it must be shewn that the substitution of the new debt extinguished the principal debt, *Hay & Kyd v. Powrie*, 1886, 13 R. 777. An assignment of an existing and ascertained debt intimated to the debtor does not discharge a surety for the original debt which is assigned, *Bradford Old Bank v. Sutcliffe*, [1918], 2 K.B. 833.

<sup>7</sup> Where part only of the debt has been paid, the surety may remain liable for the unpaid balance, even though the principal debtor has been discharged by the creditor, where the guarantee contains express provision to that effect, *Percy v. National Provincial Bank of England*, [1910] 1 Ch. 664.

the cautioners, it must be a valid payment. Thus, where a payment by one of two makers of a promissory note was voided by his supervening bankruptcy, as being an illegal preference, and the money returned, it was held that this payment did not discharge the other maker, who was merely a surety for his co-obligant.<sup>1</sup> Again, where a creditor took a cheque for the amount of the debt from one of two joint sureties, and, the cheque being dishonoured, brought an action on the cheque and obtained decree, which was not implemented, it was held that—the cheque not being in itself satisfaction of the debt but merely a conditional payment—the creditor was not barred from bringing an action against the other joint-surety on the guarantee.<sup>2</sup>

409. The debt may be satisfied, as regards the cautioner no less than as regards the principal debtor, through the operation of a claim of compensation or set-off as between the creditor and the principal debtor.<sup>3</sup> Compensation does not *ipso jure* extinguish the debt; but when pleaded and sustained, it affords a complete defence against the claim of the creditor. So in England it was laid down by Willes J. in *Bechervaise*,<sup>4</sup> upon the authority of a text in the civil law,<sup>5</sup> that where a creditor is equally liable to the principal debtor as the principal debtor to him, so that the principal debtor has a good defence at law and equity to a claim against him, a surety, who would upon payment be entitled in equity to exoneration from the principal debtor, has in this state of things a defence against a claim by the creditor. Where the principal debtor is indebted to the creditor in two or more debts, for only one of which a cautioner has intervened, the power of the principal debtor and the creditor to appropriate payments made by the principal debtor to the creditor to any of the debts, guaranteed or unguaranteed, is unaffected by the existence of the cautioner's obligation.<sup>6</sup> The only way in which the common-law power of appropriation of payments can be taken away from the principal debtor and creditor is by a contract, express or implied, with the cautioner that money paid should be applied to the guaranteed debt.<sup>7</sup>

410. Where a current account is kept between the creditor and the principal debtor, the law, in the absence of an appropriation of payments by either party, makes an appropriation according to the order of the items of the account, the first item on the debit side of the account being the item discharged or reduced by the first item on the credit side. Accordingly, where a limited guarantee is given to secure payment of a specific debt, which is entered in a current account, or a definite balance due on a current account at a given date, all payments made by the debtor, which are entered into the account subsequently to the date in question, go to reduce the debt for which the guarantors

<sup>1</sup> *Petty v. Cooke*, 1871, L.R. 6 Q.B. 790.      <sup>2</sup> *Wegg-Prosser v. Evans*, [1895] 1 Q.B. 108.

<sup>3</sup> *Hannay & Sons' Tr. v. Armstrong Bros. & Co.*, 1875, 2 R. 399; affd. 1877, 4 R. (H.L.) 43.

<sup>4</sup> 1872, L.R. 7 C.P. 372.

<sup>5</sup> Dig. 16, 2, 4.

<sup>6</sup> *In re Sherry, London and County Banking Co. v. Terry*, 1884, 25 Ch. Div. 692, per Lord Selborne.

<sup>7</sup> *Kinnaird v. Webster*, 1878, 10 Ch. D. 139; *Browning v. Baldwin*, 1879, 40 L.T. 248.

intervened; and when such subsequent payments have been made up to the amount of the debt, the liability of the guarantor is extinguished.<sup>1</sup> On the other hand, where the guarantee is continuing, *i.e.* intended to cover any fluctuating balance which may be due to the creditor on successive transactions, up to a limit stated in the guarantee, the guarantors, however large or numerous the subsequent payments, remain liable, to the extent stated, for the ultimate balance on the account. Even in a guarantee of this latter kind, however, the doctrine of appropriation of payments in a current account may operate to extinguish the liability of cautioners if an event occurs—*e.g.* the expiry of a limit of time, revocation, a change in a firm by the death of a partner,<sup>2</sup> an alteration in the mode of dealing liberating the cautioners as regards future transactions<sup>3</sup>—which fixes the liability under the guarantee as at the event in question.<sup>4</sup> The rule of appropriation of payments applies only to a current account, and, accordingly, if the creditor opens a new and distinct account, payments into this new account do not go to extinguish the cautioner's liability for the balance due on the old account.<sup>5</sup>

SUBSECTION (4).—*Revocation of his Obligation by the Cautioner.*

411. Where the cautioner's obligation is, by the terms of the contract, for a fixed period, he cannot, in the absence of a stipulation in the contract to that effect, withdraw from his obligation before the expiry of that period without taking the debtor into his own hands.<sup>6</sup> Where, however, an offer of guarantee for future advances has been made, but has not been formally accepted, the guarantor has it in his power, at any time before acceptance, to revoke it, even where a fixed period was mentioned in the offer and that period has not expired; and, even if transactions have subsequently taken place between the creditor and debtor on the faith of the offer, he may revoke it as to further transactions.<sup>7</sup> A cautioner in a guarantee, undertaken for an indefinite period and bearing that it is to remain in force until recalled in writing, is entitled, after notice in writing to the principal debtor, to bring an action of relief against the principal debtor; and the principal debtor, if he fail to obtain from the creditor a discharge of the cautioner's liability within a reasonable time, will be ordained to pay the creditor what is due under the guarantee, or to obtain and deliver to the cautioner a discharge from the creditor.<sup>8</sup> But the right of a cautioner to withdraw depends in each case upon what it was he undertook to guarantee, and

<sup>1</sup> *Lang v. Brown*, 1859, 22 D. 113; *British Linen Co. v. Thomson*, 1853, 15 D. 314.

<sup>2</sup> *Royal Bank of Scotland v. Christie*, 1839, 1 D. 745; *affd.* 1891, 2 Rob. App. 118.

<sup>3</sup> *Houston v. Spiers*, 1829, 3 W. & S. 392.

<sup>4</sup> *Cf. Cuthill v. Strachan*, 1894, 21 R. 549.

<sup>5</sup> *In re Sherry*, 1884, 24 Ch. D. 692; *Buchanan v. Main*, 1900, 3 F. 215.

<sup>6</sup> *Bell, Prin.*, s. 266; *Spence v. Brownlee*, 1834, 13 S. 199; *King v. Creighton*, 1840, 2 D. 832.

<sup>7</sup> *Offord v. Davies*, 1862, 12 C.B. N.S. 478.

<sup>8</sup> *Doig v. Lawrie*, 1903, 5 F. 295; *Gray v. Phillips*, 1905, 13 S.L.T. 145.



what the terms of the guarantee were.<sup>1</sup> A cautioner, who has granted a continuing guarantee for future transactions for an indefinite period, is entitled at any time to stop further dealings or advances on his responsibility by giving notice to the creditor that he will not be liable for further dealings or advances.<sup>2</sup> As to the right of a cautioner for a bankrupt in a composition contract to withdraw, see the authorities cited below.<sup>3</sup>

**412.** Where the engagement of an employee is for a fixed period and a cautioner guarantees that he will faithfully discharge his duties during that period, the cautioner is bound for the whole period named and, in the absence of special circumstances, *e.g.* misconduct on the part of the employee entitling the employer to dismiss him,<sup>4</sup> cannot terminate his liability.<sup>5</sup> In Scotland it appears, however, that a cautioner for the due performance by a servant of the duties of an employment, the tenure of which depends on the pleasure of the employer and employed, may put an end to his liability on giving reasonable notice to the employer, provided he takes due care to have his bond cancelled or delivered up.<sup>6</sup> The period of notice required to be given by the cautioner to the employer depends, *inter alia*, on the time necessary to effect a lawful determination of the employment by the employer. In England it has been laid down as a general principle that, "where a continuing relationship is constituted on the faith of a guarantee, there is strong reason for holding that the guarantee cannot be annulled during the continuance of the relationship."<sup>7</sup> Both in Scotland and in England, where the person whose conduct is guaranteed is guilty of misconduct, the cautioner may at once revoke his guarantee *quoad* the future.<sup>8</sup>

#### SUBSECTION (5).—*Death of Cautioner.*

**413.** Liabilities incurred under the guarantee before the date of a cautioner's death are of course enforceable against his estate. The death of a cautioner will not in itself, in the absence of a special stipulation to that effect, operate as a revocation of a continuing guarantee, unless express notice be sent to the creditor; in other words, if no notice

<sup>1</sup> *Roughead v. White*, 1913 S.C. 162, per Lord Kinnear at p. 169.

<sup>2</sup> Bell, Prin., s. 266; *Buchanan v. Main*, 1900, 3 F. 215; *Lloyds v. Harper*, 1880, 16 Ch. D. 290, at pp. 305 and 319.

<sup>3</sup> Bell, Com. ii. 353; *Ironside v. Gray*, 1841, 4 D. 629; *Lee v. Stevenson's Tr.*, 1883, 11 R. 26.

<sup>4</sup> *Infra*, para. 416.

<sup>5</sup> Brodie's Supplement to Stair, 928; *Calvert v. Gordon*, 1828, 3 Man. & R. 124; *Gordon v. Calvert*, 1828, 4 Russ. 581; *In re Crace*, [1902] 1 Ch. 733.

<sup>6</sup> Brodie's Supplement to Stair, 928; *Taylor v. Adie*, 1818, Hume, 114; *Kinloch v. McIntosh*, 1822, 1 S. 491; Bell, Com. i. 384; Bell, Prin., s. 266.

<sup>7</sup> Per Fry J. in *Lloyds v. Harper*, 1880, L.R. 16 Ch. D. 290, at p. 306. In England the question whether a person giving a guarantee for the fidelity of a servant can, in the absence of express stipulation or of misconduct on the part of the servant, terminate his liability, does not appear to be settled. The effect of the decision in *In re Crace*, [1902] 1 Ch. 733, seems to be that the liability cannot be ended even by a notice which affords the employer time lawfully to determine the service.

<sup>8</sup> *Burgess v. Eve*, 1872, L.R. 13 Eq. 450; *Phillips v. Foxall*, 1872, L.R. 7 Q.B. 666. As to the duty of the employer to inform the cautioner of the servant's misconduct, see para. 416.



be given, the guarantee subsists against his representatives, not merely for the debt as it stood at the date of his death but for future indebtedness.<sup>1</sup> Seeing that the executors of the deceased cautioner may be entirely ignorant of the existence of the guarantee, it is proper that the creditor, on becoming cognisant of the cautioner's death, should inform the executors of the guarantee which the deceased had undertaken.<sup>2</sup> Where the guarantee is one which the cautioner himself might have revoked at any time, *e.g.* a continuing guarantee for future advances or supplies, the executors of a deceased cautioner may, by sending notice of his death to the creditor, put an end to the responsibility of the estate of the deceased for subsequent advances or supplies. It is probable that—apart from special stipulations in the guarantee or other special circumstances<sup>3</sup>—specific notice of the death of the cautioner is sufficient for this purpose, although there is no express intimation that the guarantee is to be withdrawn.<sup>4</sup> On the other hand, where the guarantee is one which the cautioner himself had not the power to bring to an end by notice, notice of his death will not operate a revocation.<sup>5</sup> In a joint and several continuing guarantee the death of one cautioner does not *per se* release the surviving cautioners from liability for further transactions.<sup>6</sup>

#### SUBSECTION (6).—*Death of Principal Debtor or Creditor.*

**414.** In the ordinary case the cautioner's liability for future transactions comes to an end on the death of either of the principal contracting parties. Thus a cautioner is not liable for debts incurred to the executor of the creditor.<sup>7</sup> On the other hand, where the nature of the contract between the creditor and the principal debtor, or the language of the cautioner's contract, makes it clear that the guarantor must have intended his obligation to run on after the death of the creditor or the principal debtor, the cautioner's obligation will not be determined by the death of either of the principal parties.<sup>8</sup>

#### SUBSECTION (7).—*Discharge of Cautioners by the Conduct of the Creditor.*

**415.** Cautioners are discharged by various acts on the part of the creditor, whereby their position as cautioners is prejudiced. The

<sup>1</sup> Bell, Com. i. 385 and 387; *Morrice v. Scott*, 1831, 9 S. 480; *Kerr v. Bremner*, 1839, 1 D. 618; *British Linen Co. Bank v. Monteith*, 1858, 20 D. 557.

<sup>2</sup> See per Lord Moncreiff in *Caledonian Banking Co. v. Kennedy's Trs.*, 1870, 8 M. 862, at p. 868; cf. *Macfarlane v. Anstruther*, 1870, 9 M. 117, per Lord Neaves.

<sup>3</sup> *In re Silvester*, [1895] 1 Ch. 573; *Kemp v. Lane*, 1824, 3 S. 104.

<sup>4</sup> *Coulthart v. Clementson*, 1879, 5 Q.B.D. 42; *In re Whelan*, [1897] 1 Ir. R. 575. It has been held in England that the lunacy of a guarantor operates a revocation of the guarantee from the date of notice to the creditor (*Bradford Old Bank v. Sutcliffe*, [1918] 2 K.B. 833).

<sup>5</sup> *Lloyds v. Harper*, 1880, 16 Ch. D. 290; *In re Crace*, [1902] 1 Ch. 733.

<sup>6</sup> *Beckett v. Addyman*, 1882, 9 Q.B.D. 783. This also holds where the guarantee is joint only (*Bradford Old Bank v. Sutcliffe*, *supra*).

<sup>7</sup> *Barker v. Parker*, 1786, 1 T.R. 287; *Low v. Earl of Rosebery*, reported in More's Notes to Stair, i. 111; *Reddie v. Williamson*, 1863, 1 M. 228.

<sup>8</sup> *Wilson v. Ewing*, 1836, 14 S. 262. As to changes in a firm, to or for which a guarantee is given, *vide infra*, para. 430.

question whether the position of cautioners has been prejudiced is a question of fact, not of law.<sup>1</sup>

(i) *Positive Act by the Creditor Injurious to the Cautioner.*

416. The mere passive inactivity of the creditor to safeguard his own interests, or his neglect to call the principal debtor to account and to enforce payment by him, does not discharge a cautioner. In order to liberate the cautioner there must be some positive act on the part of the creditor which prejudices the cautioner and which is contrary to the conditions, express or implied, on which he undertook the engagement.<sup>2</sup> But—especially in a guarantee of conduct—if the conduct of the creditor is such as to amount to a wilful shutting of his eyes to the default about to be committed by the principal debtor, or to imply connivance on his part at a departure from the conditions of the cautioner's obligation, the omission of the creditor to act may be equivalent to actual commission and be sufficient to discharge the cautioner.<sup>3</sup> An omission on the part of the creditor to do something which he has expressly contracted with the cautioner to do, either in the guarantee itself or in the contract with the principal debtor embodied in or made the basis of the guarantee, is equivalent to a positive act and discharges the cautioner.<sup>4</sup> Further, it would seem that less will suffice to establish a case of connivance when the creditor is a bank than when the creditor is a private individual; for in the case of a bank certain regular checks are understood to subsist, upon which the cautioner is entitled to rely.<sup>5</sup> In a guarantee for a money debt the cautioner is not discharged by the omission of the creditor to inform him of facts coming to his knowledge during the currency of the obligation, which cast suspicion on the honesty of the principal debtor and materially increase the risk of the cautioner's undertaking; but it is probably inconsistent with the rights of the cautioner that the creditor, after such facts come to his knowledge, should make further advances to the principal debtor in reliance on the guarantee.<sup>6</sup> On the other hand, in a guarantee of the good conduct of a servant, the omission of the employer, at any time while the guarantee continues, to inform the cautioner of an act of dishonesty on the part of the servant, or of a breach of duty on his part for

<sup>1</sup> *Kingston-upon-Hull Corpn. v. Harding*, [1892] 2 Q.B. 494, per Bowen L.J. at p. 506.

<sup>2</sup> *M'Taggart v. Watson*, 1835, 1 Sh. & M'L. 553; *Creighton v. Rankine*, 1840, 1 Rob. App. 99, per Lord Chancellor Cottenham; *Biggar v. Wright*, 1846, 9 D. 78; *Bonthrone v. Patterson*, 1898, 25 R. 391; *Waugh (Shaw's Tr.) v. Clark*, 1876, 14 S.L.R. 125; *Black v. Ottoman Bank*, 1862, 15 Moore P.C. 452; *Kingston-upon-Hull Corpn. v. Harding*, *supra*.

<sup>3</sup> *M'Taggart v. Watson*, 1835, 1 Sh. & M'L. 553, per Lord Brougham; *Pringle v. Tate*, 1834, 12 S. 918; *Macfarlane v. Anstruther*, 1870, 9 M. 117; *Durham Corpn. v. Fowler*, 1889, 22 Q.B.D. 394, per Denman J.; *Dawson v. Lawes*, 1854, 23 L.J. Ch. 434.

<sup>4</sup> *Grieve v. Dow*, 1839, 1 D. 738; *Haworth & Co. v. Sickness and Accident Assurance Association*, 1891, 18 R. 563; *Walls v. Shuttleworth*, 1860, 5 H. & N. 235; 7 H. & N. 353; *Clydebank and District Water Trs. v. Fidelity and Deposit Co. of Maryland*, 1915 S.C. 362; 1916 S.C. (H.L.) 69.

<sup>5</sup> *Falconer v. Lothian*, 1843, 5 D. 866, at p. 870.

<sup>6</sup> *Bank of Scotland v. Morrison*, 1911 S.C. 593, at p. 605.

which he might be dismissed, whether accompanied by dishonesty or not, is equivalent to a positive act prejudicial to the cautioner.<sup>1</sup> In the ordinary case, the continuance of the employment by the employer after the misconduct of the servant, without communicating it to the cautioner, has only the effect of releasing the cautioner from liability in respect of future misconduct. But it has been held that an employer, by failing to intimate timeously to the cautioner the fact that the servant had committed a forgery, forfeited all right under the guarantee, on the ground that by his failure he had prevented the cautioner taking measures by which the cautioner might have protected himself against loss.<sup>2</sup>

(ii) *Alteration of the Contract by the Creditor.*

417. A cautioner is discharged from his liability if, subsequently to the execution of his contract, there is, without his assent, any material variation in the terms of contract between the creditor and the principal debtor, or if the creditor deals with the principal debtor in a manner at variance with the contract the performance of which is guaranteed, whereby the position of the cautioner is prejudiced.<sup>3</sup> The discharge of a cautioner by a variation of the contract is an absolute discharge.<sup>4</sup>

418. Where a guarantee is given in general terms for liabilities arising from a future course of dealing, and the actual terms of the contract between the creditor and the principal debtor are not made part of the cautioner's contract by narration or reference or by notice of them being sent to the cautioner, the Courts will not readily hold that alterations in the original contract between the principals, *e.g.* as to the manner or time of payment, or variations in the course of dealing under which successive liabilities arise, have the effect of releasing the cautioner, so long as the course of dealing continues to be of a character coming fairly within the scope of the guarantee.<sup>5</sup> In such a case the cautioner is taken to contemplate that the creditor and the principal debtor shall be free to arrange the details of their transactions as they think fit, provided they are not at variance with the general usage of the trade, and he is not discharged by variations in the course of dealing between the principals, provided they are in a business sense reasonable.<sup>5</sup> Even where the creditor and the principal debtor at

<sup>1</sup> *Smith v. Bank of Scotland*, 1814, 1 Dow's App. 287; *Leith Bank v. Bell*, 1830, 8 S. 721; *affd.* 1831, 5 W. & S. 703; *Phillips v. Foxall*, 1872, 7 Q.B. 666.

<sup>2</sup> *Snaddon v. London, Edinburgh, and Glasgow Insurance Co., Ltd.*, 1902, 5 F. 187.

<sup>3</sup> *Bell*, Prin. i. 289; *Bonar v. Macdonald*, 1847, 9 D. 1537; *affd.* 1850, 7 Bell's App. 379; *Ward v. National Bank of New Zealand*, 1883, 8 App. Cas. 755, at p. 763; *Taylor v. Bank of New South Wales*, 1886, 11 App. Cas. 596.

<sup>4</sup> As to the distinction between the absolute discharge resulting from an alteration of the contract and the *pro tanto* discharge resulting from actings of the creditor, whereby a security, to the benefit of which the cautioner is entitled is lost, *vide per* Lord Watson in *Taylor v. Bank of New South Wales*, *supra*, at p. 603.

<sup>5</sup> *Culder & Co. v. Cruikshank's Tr.*, 1889, 17 R. 74, *per* Lord Pres. Inglis at p. 80; *Stewart, Moir & Muir v. Brown*, 1871, 9 M. 763, *per* Lord Justice-Clerk Moncreiff at p. 766; *Bow & Christie v. Hutchison*, 1868, 6 M. 642; *Cook v. Moffat & Conston*, 1827, 5 S. 774; *Ellice v. Finlayson*, 1832, 10 S. 345.



the date of the guarantee have entered into an agreement between themselves as to the mode in which their dealings are to be carried out, the cautioner will not be released by their subsequently arranging or adopting a mode of dealing other than that originally agreed on, unless the original arrangement between the principals was communicated to him, or known to him so that the liabilities to arise out of it were actually the subject-matter of the guarantee.<sup>1</sup> The same principle is recognised in guarantees of conduct expressed in general and unqualified terms, if the actual terms of the contract between the employer and the servant are not made part of the contract between the employer and the cautioner.<sup>2</sup>

**419.** On the other hand, where a guarantee is given for a particular and definite transaction or where, in a continuing guarantee in general terms for a future course of dealing or for conduct, the terms of the original contract between the creditors and the principal debtor are made part of the contract between the creditor and the cautioner, all these terms and conditions must be strictly adhered to, and any alteration—if it is not self-evident that the alteration is unsubstantial or one which cannot be prejudicial to the cautioner<sup>3</sup>—will discharge the cautioner, if made without his consent.<sup>4</sup> The terms of the contract between the creditor and the principal debtor are part of the cautioner's obligation if the cautioner has subscribed the bond given by the principal debtor<sup>5</sup> or has signed a book of instructions and regulations given by the creditor to the agent whose performance is guaranteed.<sup>6</sup> They may also be incorporated into the cautioner's contract by narrative<sup>7</sup> or by reference,<sup>8</sup> or by proof that the cautioner had formal notice of them before entering into his contract.<sup>9</sup> It does not, however, suffice to put an end to the liability of a cautioner, who has undertaken an unqualified guarantee for future dealings or conduct to shew that some term of the principal contract, of which he had casual knowledge, had been altered in a reasonable way to suit the convenience of the principal parties.<sup>10</sup>

**420.** If the alteration in the contract between the principals is made with the knowledge and consent of the cautioner, or if, with full know-

<sup>1</sup> *Ellice v. Finlayson*, 1832, 10 S. 345; *Stewart, Moir & Muir v. Brown*, 1871, 9 M. 763; *Brown & Co.*, 1809, Hume, Decisions, 96; *Prest, Brown & Prest v. Hilson*, 1809, Hume, Decisions, 97; cf. *Egbert v. National Crown Bank*, [1918] A.C. 903.

<sup>2</sup> *Nicolsons v. Burt*, 1882, 10 R. 121; *Waugh (Shaw's Tr.) v. Clark*, 1876, 14 S.L.R. 125; *Stewart v. M'Kean*, 1855, 10 Ex. 675.

<sup>3</sup> Per Cotton L.J. in *Holme v. Brunskill*, 1877, 3 Q.B.D. 495, at p. 505, cited and approved in *Ward v. National Bank of New Zealand*, 1883, 8 App. Cas. 755, at p. 764.

<sup>4</sup> *Stewart, Moir & Muir v. Brown*, 1871, 9 M. 763, per Lord Justice-Clerk Moncreiff; *Scott v. Campbell*, 1834, 12 S. 447—a guarantee for a definite transaction; *Bonar v. Macdonald*, 1850, 7 Bell's App. 379; *Leith Bank v. Bell*, 1831, 5 W. & S. 703.

<sup>5</sup> *Bonar v. Macdonald*, 1850, 7 Bell's App. 379.

<sup>6</sup> *Leith Bank v. Bell*, 1831, 5 W. & S. 703.

<sup>7</sup> *Holme v. Brunskill*, *supra*.

<sup>8</sup> *Walker v. Fraser*, 1837, 15 S. 326.

<sup>9</sup> *British Guarantee Association v. Western Bank*, 1853, 15 D. 834; *Dundee and Newcastle Steam Shipping Co. v. National Guarantee and Suretyship Association*, 1881, 18 S.L.R. 685.

<sup>10</sup> *Nicolsons v. Burt*, 1882, 10 R. 121, at p. 125.



ledge of all the facts, he subsequently assents to the alteration, he is not discharged. But consent on the part of a cautioner to an alteration of the contract will not be implied from mere silence; <sup>1</sup> nor is a cautioner, on becoming aware that the creditor intends a variation, which, if made without his consent, may discharge him, bound to warn the creditor against carrying it out.<sup>2</sup> A cautioner for the good conduct of an employee is not discharged from liability under his guarantee, although his position has been altered by the conduct of the employer, when that conduct was brought about by a fraudulent act or omission on the part of the employee, against which the cautioner has guaranteed the employer.<sup>3</sup>

(iii) *Creditor "Giving Time" to the Principal Debtor.*

421. A cautioner is discharged by the creditor, without his consent, entering into a binding agreement with the principal debtor <sup>4</sup> to give him time.<sup>5</sup> To "give time" means to extend, by a legally binding agreement between the creditor and the principal debtor, the period at which, by the contract between them, the principal debtor was originally liable to pay the debt to the creditor. The ground upon which the cautioner is discharged by the creditor giving time to the principal debtor is that the cautioner's right, on paying the creditor, to enforce his relief against the principal debtor is thereby interfered with, it being then out of his power to operate the same remedy against the principal debtor as he would have had under the original contract. The injury to the cautioner may be real, or it may be merely theoretical; in either case, the cautioner is entitled to be freed from his obligation.<sup>6</sup> The essential point to be determined is whether, by the new agreement between the principals, the creditor's right of action against the principal debtor is suspended beyond the period at which the principal debtor was originally liable to pay the debt. Where the debt for which the cautioner intervened is payable on a definite date, the cautioner is discharged by any agreement between

<sup>1</sup> *Allan, Buckley Allan & Milne v. Pattison*, 1893, 21 R. 195; *General Steam Navigation Co. v. Rolt*, 1859, 6 C.B. N.S. 550.

<sup>2</sup> *Polak v. Everett*, 1876, 1 Q.B.D. 669, per Blackburn J. at p. 673.

<sup>3</sup> *Kington-upon-Hull Corpn. v. Harding*, [1892] 2 Q.B. 495.

<sup>4</sup> An agreement by the creditor with a surety to give time to the principal debtor does not discharge the other sureties (*Clarke v. Birley*, 1889, 41 Ch. D. 422).

<sup>5</sup> Bell, Prin., s. 262; *Johnstone v. Duthie*, 1892, 19 R. 624; *Rees v. Berrington*, Wh. & Tud. L.C. Eq. (8th ed.), ii. 571; *Scottish Provident Institution v. Ferrier's Trs.*, 1871, 8 S.L.R. 390; *Swire v. Redman*, 1876, 1 Q.B.D. 536. A repudiation by the cautioner of liability does not justify the creditor in giving time (*Johnstone v. Duthie*, *supra*). Where a cautioner agrees to give time to the principal debtor, and time is given, that cautioner loses his right to claim contribution from co-cautioners who have not agreed to the giving of time (*Way v. Hearn*, 1862, 11 C.B. N.S. 774, at pp. 781, 782; cf. *Greenwood v. Francis*, [1899], 1 Q.B. 312).

<sup>6</sup> *Johnstone v. Duthie*, *supra*, at p. 628; *Samuell v. Howarth*, 1817, 3 Mer. 272, per Lord Eldon at p. 279; *Ward v. National Bank of New Zealand*, 1883, 8 App. Cas. 755, at p. 763; *Strong v. Foster*, 1855, 17 C.B. 201.

the creditor and debtor by which the date of payment is postponed or by which the creditor ties his hands and prevents himself or the cautioner from taking action against the principal debtor at the time when, by the original agreement, he might have done so. The length of time given is immaterial.<sup>1</sup> On the other hand, in a guarantee for the price of goods to be sold in a course of future dealings, or of money to be advanced, in which no definite date of payment is mentioned, it is more difficult to determine whether, in virtue of a new agreement between the creditor and the principal debtor, there has been any actual postponement of the time of payment.<sup>2</sup> In a guarantee for the price of goods to be supplied the cautioner is presumed to have in contemplation the general usage of the trade, and the giving of the usual trade credit will not in itself be treated as a giving of time.<sup>3</sup> In a general guarantee for future dealings the real question to be considered is whether, under the new arrangement between the principals, the credit or indulgence allowed to the debtor was unreasonable in the circumstances. If the credit or indulgence allowed is not in itself unreasonable, the guarantee will be held to cover the actual transactions as arranged between the parties.<sup>4</sup>

**422.** In order to constitute a giving of time so as to release the cautioner, there must be a positive contract, express or implied, by the creditor, by which his hands are tied. "In the language of the law, to give time does not consist in refraining from suing, but in the creditor putting himself under a disability to sue by agreeing to postpone payment of his debt."<sup>5</sup> Mere forbearance or delay by the creditor in taking proceedings against the principal debtor will not release the cautioner,<sup>6</sup> unless the forbearance or delay is in contravention of an express or clearly implied undertaking of the creditor to the cautioner.<sup>7</sup> In order to discharge a cautioner, the agreement to give the debtor an extension of time must be one that is legally binding on the creditor.<sup>8</sup> The agreement between the creditor and the

<sup>1</sup> *Richardson v. Harvey*, 1853, 15 D. 628; *Polak v. Everett*, 1876, 1 Q.B.D. 669, per Blackburn J. at p. 674.

<sup>2</sup> *Calder & Co. v. Cruikshank's Tr.*, 1889, 17 R. 74; *Stewart, Moir & Muir v. Brown*, 1871, 9 M. 763.

<sup>3</sup> *Stewart, Moir & Muir v. Brown*, *supra*; *Samuell v. Howarth*, 1817, 3 Mer. 272; *Combe v. Woolf*, 1832, 8 Bing. 156.

<sup>4</sup> *Calder & Co. v. Cruikshank's Tr.*, *supra*; *Bowe & Christie v. Hutchison*, 1868, 6 M. 642; *Johnstone v. Duthie*, *supra*; *MacLaggan & Co. v. Macfarlan*, 19th November 1813, F.C.

<sup>5</sup> Per Lord Rutherford Clark in *Hay & Kyd v. Powrie*, 1886, 13 R. 777; cf. *Rouse v. Bradford Banking Co.*, [1894] A.C. 586, per Lord Herschell at p. 594.

<sup>6</sup> *Fleming v. Wilson*, 1823, 2 S. 336; *Morison v. Balfour*, 1849, 11 D. 653; *Creighton v. Rankin*, 1840, 1 Rob. App. 99; *Hamilton's Est. v. Bank of Scotland*, 1913 S.C. 743, where averments of actings by the creditor, which did not disable him from instantly exacting payment from the debtor, were held irrelevant to support the contention that he had given time to the debtor.

<sup>7</sup> *Lawrence v. Walmsley*, 1862, 12 C.B. N.S. 799; *Bank of Ireland v. Beresford*, 1818, 6 Dow's App. 233.

<sup>8</sup> *Samuell v. Howarth*, *supra*, per Lord Eldon at p. 278; *Philpot v. Briant*, 1828, 4 Bing. 717; *Strong v. Foster*, 1855, 17 C.B. 201.

principal debtor must involve an actual giving of time; that is, it must, as a matter of fact, tie the creditor's hands so as to prevent him enforcing the debt.<sup>1</sup> Thus, if the creditor takes a bill or note from the debtor, the effect of this upon the cautioner's liability will depend upon whether the bill or note is merely taken as a collateral security or whether it postpones the right of action upon the debt.<sup>2</sup> The discharge of a cautioner resulting from a contract to give time, like every discharge resulting from a variation of the original contract, is an absolute discharge.<sup>3</sup> But where the guarantee is for several distinct transactions between the creditor and principal debtor, time given in respect of one of these transactions discharges the cautioner as to that transaction only, and does not affect his liability as to the other transactions.<sup>4</sup>

423. After the creditor has obtained judgment against both the principal debtor and the surety, an agreement to give time to the former does not discharge the surety;<sup>5</sup> and after the creditor has obtained decree against the cautioners, no subsequent dealings with the principal debtor in the way of giving him time will discharge the cautioners.<sup>6</sup> Where a cautioner has consented, either previously,<sup>7</sup> contemporaneously, or subsequently, to the arrangement by which time is given to the principal debtor, he is not discharged;<sup>8</sup> but the assent of the cautioner to an arrangement giving time will not, unless in special circumstances, be inferred from mere knowledge on his part, combined with silence.<sup>9</sup> A cautioner is not discharged by an agreement by the creditor to give time to the debtor, if in this agreement the creditor's remedies against the cautioner are expressly reserved; for such a reservation keeps alive the cautioner's right of relief against the principal debtor, so that he is in no way prejudiced by the agreement.<sup>10</sup> The reservation is effectual although the cautioner is not a party to it and has no notice of it.<sup>11</sup>

<sup>1</sup> *Nicolsons v. Burt*, 1882, 10 R. 121, per Lord Pres. Inglis at p. 127; *Rouse v. Bradford Banking Co.*, [1894] A.C. 586.

<sup>2</sup> *Oriental Finance Corporation v. Overend, Gurney & Co.*, 1874, L.R. 7 H.L. 348, *vide per* Lord Cairns at p. 361; *Palmer v. Bramley*, [1895] 2 Q.B. 405; *Johnstone v. Duthie*, 1892, 19 R. 624.

<sup>3</sup> *Coombe v. Woolf*, 1832, 8 Bing. 156, per Alderson J. at p. 163; *Polak v. Everett*, 1876, 1 Q.B.D. 669, per Blackburn J. at p. 674; *Johnstone v. Duthie*, *supra*.

<sup>4</sup> *Croydon Commercial Gas Co. v. Dickinson*, 1876, L.R. 2 C.P.D. 46; *cf. Skillett v. Fletcher*, 1866, L.R. 1 C.P. 217; 1867, 2 C.P. 469; *Harrison v. Seymour*, 1866, L.R. 1 C.P. 518; *Bingham v. Corbitt*, 1864, 34 L.J. Q.B. 37.

<sup>5</sup> *In re A Debtor* (No. 14 of 1913), [1913] 3 K.B. 11.

<sup>6</sup> *Aikman v. Fisher*, 1835, 14 S. 56; *Jenkins v. Robertson*, 1854, 2 Drew 351.

<sup>7</sup> The instrument of guarantee may itself authorise the creditor to give time to the debtor (*Hamilton's Exr. v. Bank of Scotland*, 1913 S.C. 743).

<sup>8</sup> *Whiting v. Burke*, 1871, L.R. 6 Ch. 342; *Perry v. National Provincial Bank*, [1910] 1 Ch. 464; *Rouse v. Bradford Banking Co.*, [1894] 2 Ch. 32; in the House of Lords, ([1894] A.C. 586. It being held that no time was given, the question as to consent by the surety did not arise); *Dixon & Douglas v. Thomson*, 1847, 9 D. 679; *Clark v. Devlin*, 1804, 3 B. & P. 363; *Mayhew v. Crickett*, 1818, 2 Swanst. 185, per Lord Eldon at p. 192.

<sup>9</sup> *Allan, Buckley Allan & Milne v. Pattison*, 1893, 21 R. 195.

<sup>10</sup> *Crawford v. Muir*, 1873, 1 R. 91; *affd.* 2 R. (H.L.) 148; *Kearsley v. Colv.* 1846, 16 M. & W. 128, where the reasons of the rule are stated by Parke B. at p. 135.

<sup>11</sup> *Webb v. Hewitt*, 1857, 3 K. & J. 438; *Boulter v. Mayor*, 1865, 19 C.B. N.S. 76, per Byles J. at p. 82.



Where the essential effect of the new arrangement between the principals is to impair the remedies of the cautioner against the principal debtor, the cautioner will be discharged in spite of a clause reserving rights against the cautioner.<sup>1</sup>

(iv) *Creditor releasing the Principal Debtor.*

**424.** The cautioner is discharged if the creditor releases the principal debtor, or if the release of the principal debtor is the result of some act or omission on the part of the creditor.<sup>2</sup> On principle, the extinction of the principal obligation necessarily involves the extinction of the accessory obligation; for there can be no guarantee of a principal obligation which has ceased to exist. Thus, if the creditor allows prescription to run on the principal obligation, the cautioner's obligation is extinguished.<sup>3</sup> In order, however, that a release of the principal debtor by the act of the creditor shall discharge the cautioner, there must be an actual legal discharge of the debtor, and not merely an intention to release him.<sup>4</sup> The creditor's release of the principal debtor will not operate the liberation of the cautioner, if the latter has consented to the release, and such consent may be given in the instrument of guarantee<sup>5</sup> or at the time of the release,<sup>6</sup> or subsequently.<sup>7</sup> Again, in order that the release of the principal debtor may have the effect of liberating the cautioner, it must have been brought about by a voluntary act or contract on the part of the creditor, and not by the operation of law, as in bankruptcy.<sup>8</sup> The law on this matter, in case of bankruptcy, is now statutory, it being enacted by s. 52 of the Bankruptcy (Scotland) Act, 1913,<sup>9</sup> that, when a creditor has an obligant bound to him along with the bankrupt for the whole or part of the debt, such obligant shall not be freed from liability for such debt by the creditor receiving dividends on the bankrupt's estate or assenting to the discharge of the bankrupt or to any composition or deed of arrangement. So, too, where the principal debtor is a company, the adoption of a scheme of arrangement under the Joint Stock Companies Arrangement Act, 1870, does not liberate the sureties.<sup>10</sup> In a discharge of the principal

<sup>1</sup> *Bolton v. Buckenham*, [1891] 1 Q.B. 278.

<sup>2</sup> *Bell, Prin.*, s. 260; *Wallace v. Donald*, 1825, 3 S. 433.

<sup>3</sup> *Ersk. iii.* 3. 66; *Halyburtons v. Graham*, 1735, Mor. 2073. This holds not only where the principal debtor is extinguished by the prescription but also where the prescription merely limits the mode of proof, it being a general rule of law that every exception competent to the principal debtor is competent to the cautioner (*Duff v. Innes*, 1771, Mor. 1059; *Doull v. Home*, 1695, Mor. 2077).

<sup>4</sup> *Scholefield v. Templer*, 1859, 28 L.J. Ch. 452.

<sup>5</sup> *Couper v. Smith*, 1838, 4 M. & W. 519; *Union Bank of Manchester v. Beech*, 1865, 34 L.J. Ex. 133.

<sup>6</sup> *Fleming v. Wilson*, 1823, 2 S. 336.

<sup>7</sup> *Wright's Trs. v. Hamilton's Trs.*, 1834, 12 S. 692.

<sup>8</sup> *Bell, Com. i.* 359 *et seq.*; *Whitelaw & Kirk v. Stein*, 20th May 1814, F.C.; *Anderson v. Wood*, 1821, 1 S. 28.

<sup>9</sup> 3 & 4 Geo. V. c. 20.

<sup>10</sup> *In re London Chartered Bank of Australia*, [1893] 3 Ch. 540, at p. 546; cf. *In re Fitzgeorge, Ex parte Robson*, [1905] 1 K.B. 462.



debtor in bankruptcy, the surety cannot complain of what is not the act of the creditor but the act of the law; and the principal debtor, being entirely freed by the discharge, is unaffected by the liability of the surety.<sup>1</sup> On the other hand, where there is no sequestration under the Bankruptcy Acts, the cautioner is liberated if, without his consent, the creditor agrees to accept a composition from the principal debtor or enters into arrangements reducing his liability.<sup>2</sup>

425. The release of the principal debtor by the voluntary act of the creditor will not liberate the cautioners, if the release is granted subject to an express reservation of the creditor's remedies against the cautioners, so that it can be construed as a mere *pactum de non petendo* on the part of the creditor,<sup>3</sup> for such an arrangement does not involve any interference with, or suspension of, the rights of the cautioners. Such a *pactum de non petendo* not being inconsistent with the rights of the cautioners, it is not necessary that notice of it be given to them.<sup>4</sup> Where the principal debtor is absolutely discharged, so that the debt is extinguished, the reservation of a right to proceed against the cautioners is necessarily idle and is treated as *pro non scripto*.<sup>5</sup> The question in each case is whether, in law and in fact, the release of the principal debtor by the creditor amounts to an absolute discharge, or whether it is subject to conditions which preserve intact all the rights of the cautioners.<sup>6</sup>

(v) *The Creditor Releasing a Co-cautioner.*

426. A discharge or release of one cautioner by the voluntary act of the creditor operates as a discharge of the other cautioners. The Scots law on this subject is regulated by s. 9 of the Mercantile Law Amendment Act, which provides: "Where two or more parties shall become bound as cautioners for any debtor, any discharge granted by the creditor in such debt or obligation to any one of the cautioners, shall be deemed and taken to be a discharge granted to all the cautioners; but nothing herein contained shall be deemed to extend to the case of a cautioner consenting to the discharge of a co-cautioner who may have become

<sup>1</sup> *Ex parte Jacobs*, 1875, L.R. 10 Ch. 211, at p. 214.

<sup>2</sup> *Bell*, Com. i. 377; *Lewis v. Jones*, 1825, 4 B. & C. 506; *Cragoe v. Jones*, 1873, L.R. 8 Ex. 81. The subsequent sequestration of the debtor or other special circumstances may prevent cautioners from being liberated (*Freeland v. Finlayson*, 1823, 2 S. 389; *Muir v. Scott*, 1825, 4 S. 252; *Whitelaw & Kirk v. Stein*, 20th May 1814, F.C.; *Bell*, Com. i. 377, 378).

<sup>3</sup> *Smith v. Ogilvie*, 1821, 1 S. 149; *affd.* 1825, 1 W. & S. 315; *Crawford v. Muir*, 1873, 1 R. 91; *affd.* 1875, 2 R. (H.L.) 148.

<sup>4</sup> *Webb v. Hewitt*, 1857, 3 K. & J. 438, at p. 442.

<sup>5</sup> *Nicholson v. Revill*, 1836, 4 A. & E. 675; *Webb v. Hewitt*, *supra*. See observations on this case by Lord Hatherley in *Muir v. Crawford*, 1875, 2 R. (H.L.) 148, at pp. 149, 150; *Commercial Bank of Tasmania v. Jones*, [1893] A.C. 313, at p. 316.

<sup>6</sup> *Muir v. Crawford*, 1875, 2 R. (H.L.) 148, per Lord Chancellor Cairns at p. 149; *Green v. Wynn*, 1869, L.R. 4 Ch. 204; *Bateson v. Gosling*, 1871 L.R. 7 C.P. 9; *Smith v. Harding*, 1877, 5 R. 147; *Commercial Bank of Tasmania*, *supra*; *Perry v. National Provincial Bank*, [1910] 1 Ch. 464; *Bradford Old Bank v. Sutcliffe*, [1918] 2 K.B. 833.

bankrupt.”<sup>1</sup> This enactment applies only where the obligations of the various guarantors or cautioners are really joint and several.<sup>2</sup> It has no application where the obligation of one guarantor is undertaken separately from, and independently of, obligations undertaken by other guarantors. Where separate and independent guarantees are given, it being no part of the contract of any of the guarantors that any other shall be liable, the creditor may discharge or deal with one of them without discharging the others, because in that case there is no contractual relation whatever between the various obligants, each of whom stands by himself.<sup>3</sup> The total liberation introduced by the Act—for at common law, if the obligation was for a sum already due, the discharge was limited to the extent of the contribution which could have been claimed from the discharged cautioner<sup>4</sup>—proceeds on the principle that when cautioners contract jointly and severally it is an essential part of the contract of each that all shall be bound, so that the discharge of one is an alteration of the contract of all. On a similar principle, where a guarantee is in a form shewing that it is intended to be undertaken by a certain number of persons as joint and several guarantors, a guarantor who signs it is not bound if any of the intended guarantors does not sign it.<sup>5</sup>

427. It would appear that where the discharge of a cautioner is not an absolute discharge but is qualified by an express condition reserving the creditor's rights against the other cautioners, so that it is merely a *pactum de non petendo*, the other cautioners are not discharged; for in that case the cautioner with whom the creditor makes the agreement remains liable to claims at the instance of the other cautioners, and the agreement does not suspend or prejudice the rights of the other cautioners to relief against the cautioner with whom the agreement has been made. This is the rule in England,<sup>6</sup> and it is probable that s. 9 of the Mercantile Law Amendment Act, in spite of its general terms, does nothing more than assimilate the law of Scotland to the law of England. In *Morton's Trs. v. Robertson's Judicial Factor*<sup>7</sup>—where the obligants were not cautioners but co-debtors—Lord M'Laren observed: “In order that a discharge granted to a co-obligant should have the effect of releasing

<sup>1</sup> 19 & 20 Vict. c. 60, s. 9.

<sup>2</sup> *Morgan v. Smart*, 1872, 10 M. 614, per Lord Justice-Clerk Moncreiff; *Union Bank of Scotland v. Taylor*, 1925 S.C. 835, per Lord Pres. Clyde at p. 841.

<sup>3</sup> *Ibid.* See also *Ward v. National Bank of New Zealand*, 1883, 8 App. Cas. 755.

<sup>4</sup> Bell, Com. i. 376; *Wingate v. Martin*, 1829, 8 S. 185; *Gilmour v. Finnie*, 1832, 11 S. 193; *Church of England Life and Fire Assurance Co. v. Wink*, 1857, 19 D. 1079; *Stirling v. Forrester*, 1821, 1 Sh. App. 37, and (a fuller report) 3 Bligh 575.

<sup>5</sup> *Patterson v. Bonar*, 1844, 6 D. 987; *Scottish Provincial Assurance Co. v. Pringle*, 1858, 20 D. 465; *Evans v. Bremridge*, 1856, 8 De G. M. & G. 101.

<sup>6</sup> *Price v. Barker*, 1855, 4 El. & Bl. 760; *Bateson v. Gosling*, 1871, L.R. 7 C.P. 9. In England, in cases where an agreement between the creditor and a surety is not an absolute discharge, another surety is discharged only to the extent of the contribution which, if the agreement had not been made, he could have claimed from that surety (*Ex parte Gifford*, 1802, 6 Ves. 365; *Ward v. National Bank of New Zealand*, 1882, 8 App. Cas. 755; *Wolmershausen v. Wolmershausen*, 1890, 38 W.R. 537).

<sup>7</sup> 1892, 20 R. 72.

the other obligants, it must amount to an unqualified discharge of the joint and several obligation, or (which is the same thing in legal effect) an agreement that the debtor shall not only be discharged in a question with his creditor, but shall also be discharged of his liability to contribute in a question with other co-obligants.”

(vi) *Creditor giving up or losing Funds or Securities.*

428. If the creditor has lost or relinquished any security held by him for the debt, or has permitted it to get into possession of the debtor, or has failed owing to negligence to make it effectual by completing his title, the cautioner is discharged to the extent of such security.<sup>1</sup> The creditor must be able to hand over the securities in exactly the same position as they stood in his hands, and with the remedies on them unimpaired.<sup>2</sup> Even where the loss of a security is not due directly to the act of the creditor, but has occurred through the negligence of a factor or agent, the cautioner is relieved to the extent of the loss.<sup>3</sup> Where the creditor has a right of retention he is, in a question with cautioners, bound to exercise it; but the circumstances may be such as to justify the creditor in refusing to retain, and, in such a case, the cautioners are not freed to any extent by the creditor paying over the sum to a person entitled to it.<sup>4</sup> If the benefit of a security be lost by the omission of the creditor to perfect the security by notice, the cautioner is discharged *pro tanto*.<sup>5</sup> In a guarantee for payment of goods supplied by a wholesale firm of clothiers to a draper, the consent of the creditors, without informing the cautioner, to an arrangement whereby the principal debtor's stock-in-trade and book-debts were sold and the proceeds paid to the creditors in part payment of the debt was held to be consistent with their duty to the cautioner.<sup>6</sup> A mere depreciation in the value of securities held by the creditor for the debt, or even the fact that such securities have turned out utterly worthless, will not liberate the cautioner, unless it is shewn that the loss was in some way attributable to the fault of the creditor.<sup>7</sup>

429. The discharge of a cautioner owing to securities being lost or given up by the creditor is, it is to be observed, different in its effect from the discharge of a cautioner owing to an alteration in the contract between the creditor and the principal debtor. In the former class of cases the cautioner is discharged only *pro tanto*, to the extent of the

<sup>1</sup> Bell, Prin., s. 264; Ersk. iii. 5, 11; *Sligo v. Menzies*, 1840, 2 D. 1478; *Story v. Currie*, 1830, 8 S. 853; *Fleming v. Thomson*, 1826, 2 W. & S. 277; *Carter v. White*, 1883, 25 Ch. Div. 666, at p. 670.

<sup>2</sup> *Fleming v. Thomson*, 1826, 2 W. & S. 277.

<sup>3</sup> *Wright's Trs. v. Hamilton's Trs.*, 1835, 13 S. 380; cf. *Caledonian Banking Co. v. Kennedy's Trs.*, 1870, 8 M. 862; *Wallace v. Donald*, 1825, 3 S. 433; *McKenzie v. Macartney*, 1831, 5 W. & S. 506.

<sup>4</sup> *Marshall & Co. v. Pennycook*, 1908 S.C. 276.

<sup>5</sup> *Capel v. Butler*, 1825, 2 S. & S. 457; *Wulff v. Jay*, 1872, L.R. 7 Q.B. 756; *Harmer & Co. v. Gibb*, 1911 S.C. 1341, at pp. 1347, 1348.

<sup>6</sup> *Harmer & Co. v. Gibb*, *supra*.

<sup>7</sup> *Hardwick v. Wright*, 1865, 35 Beav. 133.



securities passed from; in the latter class of cases he is wholly discharged.<sup>1</sup> If, however, it is expressly stipulated between the creditor and the cautioner that the creditor shall acquire or preserve any right against the debtor, his failure to do so is an alteration of the contract which discharges the cautioner *in toto*.<sup>2</sup> On the other hand, the liability of a cautioner is not affected by the creditor dealing with a security in a manner contemplated in the arrangement under which he holds it.<sup>3</sup> Where one of several cautioners holds a separate security over the estate of the principal debtor, he must, in dealing with it, observe the same care on behalf of his co-cautioners as the creditor is bound to observe on behalf of the whole body of the cautioners; and if he fail to do this, the co-cautioners are liberated to that extent, in a question with him.<sup>4</sup>

(vii) *Change in Firm to or for which Cautionary Obligation undertaken.*

430. The effect of a change in a firm, to or for which a cautionary obligation has been undertaken, was first made the subject of statutory regulation in the Mercantile Law Amendment Act, 1856.<sup>5</sup> This section was repealed by s. 48 of the Partnership Act, 1890,<sup>6</sup> and re-enacted in a more explicit and somewhat more emphatic form by s. 18 of the same statute<sup>7</sup> as follows: "A continuing guaranty or cautionary obligation given either to a firm, or to a third person in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given." This statutory rule is declaratory of the principles of the common law. A change in the firm, sufficient to put an end to the cautioner's liability so far as future transactions are concerned, may occur by the introduction of a new partner,<sup>8</sup> or by the death or retiral of an old partner.<sup>9</sup> The liability of a cautioner for a debt already incurred and ascertained is not terminated by the transfer of the debt from the old to the new firm.<sup>10</sup> An intention that a guarantee for future transactions shall continue to be binding notwithstanding changes in the constitution of the firm may be inferred, where the members of the firm are numerous and frequently changing, it being

<sup>1</sup> *Supra*, paras. 417, 421.

<sup>2</sup> *M'Tavish v. Scott*, 1830, 4 W. & S. 410; *Drummond v. Rannie*, 1836, 14 S. 437; *Polak v. Enerett*, 1876, 1 Q.B.D. 669, per Blackburn J. at pp. 675, 676; *Carter v. White*, 1883, 25 Ch.D. 666, at p. 670.

<sup>3</sup> *Taylor v. Bank of New South Wales*, 1886, 11 App. Cas. 596.

<sup>4</sup> *Hume v. Youngson*, 1830, 8 S. 295.

<sup>6</sup> 53 & 54 Vict. c. 39, s. 48.

<sup>5</sup> 19 & 20 Vict. c. 60, s. 7.

<sup>7</sup> 53 & 54 Vict. c. 39, s. 18.

<sup>8</sup> *Spiers v. Houston's Exrs.*, 1829, 3 W. & S. 392; *Bowie v. Watson*, 1840, 2 D. 1061; *Montefiore v. Lloyd*, 1863, 15 C.B. N.S. 203.

<sup>9</sup> *Elton, Hammond & Co. v. Neilson*, 24th June 1812, F.C.; *Philip v. Mcville*, 21st February 1809, F.C.; *University of Cambridge v. Baldwin*, 1839, 5 M. & W. 580; *Royal Bank of Scotland v. Christie*, 1839, 1 D. 745; app. 1841, 2 Rob. App. 118.

<sup>10</sup> *Bradford Old Bank v. Sutcliffe*, [1918] 2 K.B. 833.



apparent that credit is not given to them individually.<sup>1</sup> The subsequent incorporation of a voluntary association or partnership firm, to which a guarantee is given, is a change sufficient to terminate the cautioner's liability for future transactions;<sup>2</sup> but a mere change of name consequent on registration with limited liability is not such a change as will release cautioners.<sup>3</sup>

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<sup>1</sup> Bell, Com. (M'Laren's ed.), i. 387 ; cf. *Smith v. Patrick*, 1901, 3 F. (H.L.) 14.

<sup>2</sup> *Dance v. Girdler*, 1804, 1 B. & P. (N.R.) 34.

<sup>3</sup> *Groux's Soap Co. v. Cooper*, 1860, 8 C.B. N.S. 800.

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## CAVEAT.

*See* BILL CHAMBER ; SHERIFF COURT

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## CAVEAT EMPTOR.

*See* SALE.

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## CEMETERY.

*See* BURIAL AND CREMATION.

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## CENSORSHIP.

*See* PRESS AND PRINTING.

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## CERTIFICATE OF JUDGMENT.

*See* JUDGMENTS EXTENSION ACTS.

## CERTIFICATE OF REGISTRY.

*See* SHIP.

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## CERTIFICATE OF SHARES.

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## CERTIFICATE OF VALIDITY.

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## CERTIFICATION.

*See* PRACTICE AND PROCEDURE; SHERIFF COURT.

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## CESS.

*See* LAND TAX.

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## CHAIRMAN.

*See* MEETINGS.

## CHALDER.

*See* TEINDS.

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## CHALKING OF DOOR.

*See* LANDLORD AND TENANT.

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## CHALLENGE.

*See* CRIME; JURIES.

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## CHAMBERLAIN, THE LORD GREAT.

CHAMBERLAIN OF SCOTLAND.

CHAMBERLAIN (THE LORD) OF  
THE HOUSEHOLD.

*See* OFFICERS AND DEPARTMENTS OF STATE.

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## CHANCELLOR.

*See* CHANCERY; JURIES.

# CHANCERY.

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## SECTION 1.—HISTORICAL.

**431.** As in England, this was originally the department under the charge of the official known as the Lord Chancellor.<sup>1</sup> In the history of Scotland the Chancellor appears for the first time in the reign of Alexander I. as a witness of charters, at the beginning of the twelfth century when royal fiefs and charters were first introduced. He was also the official who, by the King's writ, afforded redress to appellants who had been wronged by the Courts of law or by persons in power. Unlike the English Chancellor, the Scottish Chancellor had no Court of his own, but for some time he presided over the Court of Session,<sup>2</sup> and it was also his duty to admit scribes and notaries to office.<sup>3</sup> As in England, the Lord Chancellor of Scotland was Keeper of the Great Seal; but when this function was transferred to the English Lord Chancellor by the Treaty of Union, the Scottish office of Chancellor ceased to exist. The official business of sealing writs is, however, still transacted by the Chancery department in Scotland.

**432.** Prior to the institution of the Court of Session, questions of property and possession were tried upon brieves issued from Chancery in name of the Sovereign and addressed to an inferior judge, directing him to make trial by jury of the questions stated in the brieve. When the Court of Session was formed, the procedure by brieve was largely superseded by the new procedure by summons, but certain brieves remained in general use. In particular, service of heirs continued to be initiated by brieve from Chancery. See BRIEVE.

<sup>1</sup> See Stubbs, Constitutional History; Select Charters: Pollock & Maitland, History of English Law: Hill Burton, History of Scotland; The Scottish Acts of Parliament; Register of the Privy Council.

<sup>2</sup> Act 1532.

<sup>3</sup> Act 1546.



SECTION 2.—SHERIFF OF CHANCERY.

**433.** The office of Sheriff of Chancery was created by the Service of Heirs Act, 1847,<sup>1</sup> the provisions of which were afterwards re-enacted with considerable alterations and additions by the Titles to Land Consolidation (Scotland) Act, 1868,<sup>2</sup> the qualifications for the office being the same as those necessary for appointment as sheriff of a county in Scotland.

SECTION 3.—ABOLITION OF BRIEVES: SERVICE BY PETITION.

**434.** The Act of 1847 provided,<sup>3</sup> that from 15th November 1847 the practice of issuing brieves from Chancery for the service of heirs should cease, and that from and after that date every person desirous of being served heir, whether in general or special, and in whatever character, to a person deceased should, instead of applying as formerly for a brieve from Chancery, present a petition of service to the sheriff in the manner provided by the Act. For all practical purposes the procedure is now regulated by the Act of 1868, ss. 27 *et seq.*

If the ancestor died feudally vest in the estate, the heir must complete his title by *special service*, and on this special service he must be infeft. Should the heir die after being served heir in special but before being infeft, then the next heir must disregard the special service, and enter to the person last infeft. Where the ancestor was uninfeft, but held personal rights to the subjects, the heir expedes a *general service*, the effect of which is that he acquires a right to the unexecuted procuratories and precepts, in virtue of which he may be infeft. If he die after being served heir in general but before being infeft, the personal rights pass to his own heir-at-law, who must be served heir to him and not to the former proprietor.

SECTION 4.—JURISDICTION OF SHERIFF OF CHANCERY.

**435.** In the case of a general service, the petition may be presented to the Sheriff of the county within which the deceased had at the time of his death his ordinary or principal domicile, or to the Sheriff of Chancery; and if at the time of his death the deceased had his domicile furth of Scotland, the petition must be presented to the Sheriff of Chancery.<sup>4</sup> In the case of a special service, the petition may be presented either to the Sheriff of the county within whose jurisdiction the lands are situated, or to the Sheriff of Chancery; but where the lands are situated in more than one county, then the application must be to the Sheriff of Chancery.<sup>4</sup> The jurisdiction of the Sheriff of Chancery is therefore co-ordinate with that of the Sheriffs of counties, except where the domicile of the deceased was at the date of his death furth of Scotland, and where the lands are

<sup>1</sup> 10 & 11 Vict. c. 47.

<sup>2</sup> 31 & 32 Vict. c. 101.

<sup>3</sup> Sec. 2.

<sup>4</sup> Sec. 28.

situated in more counties than one, in which case it is privative. Having regard to the terms of s. 10 of the Act of 1847, and the corresponding section in the Act of 1868,<sup>1</sup> it is doubtful whether an application for special service to a person who has died abroad, though not domiciled furth of Scotland, can competently be presented to the Sheriff of the county in which the lands are situated. It is thought that the safer practice is in all such cases to present the petition to the Sheriff of Chancery.

#### SECTION 5.—PROCEDURE IN PETITIONS FOR SERVICE.

##### SUBSECTION (1).—*Form and General Procedure.*

**436.** Petitions for service must be signed by the petitioner, or by a mandatarly specially authorised for the purpose, and are to be in the forms of the statutory schedules.<sup>2</sup> Various particulars, which formerly required to be specified in the brieves from Chancery, are now dispensed with. Proof in petitions for service, which may be either documentary or parole, may be taken either before the Sheriff himself, or by the provost or bailies of any city or royal or parliamentary burgh, or by any justice of the peace or notary public, all of whom are authorised to act as commissioners without any special appointment, or by any commissioner whom the Sheriff may appoint. The parole evidence must be taken down in writing, and a full and complete inventory of the documents produced made out and certified by the Sheriff or his commissioner, and, on considering the evidence, the Sheriff, without the aid of a jury, pronounces decree, serving or refusing to serve, and his decree is equivalent to the verdict of the jury under the brieve of inquest, according to the law and practice which prevailed prior to 1847.<sup>1</sup> The usual practice is for the depositions of witnesses in applications for service to be taken before a commissioner, who reports them, along with the documents produced, to the Sheriff for his disposal. Where competing petitions are presented, they are proceeded with in the same way; and the Sheriff may, if he see fit, at any time before pronouncing decree in the first petition, sist procedure therein in the meantime, or conjoin the petitions, and thereafter proceed to take evidence, allowing each party a proof in chief with reference to his own claim, and a conjunct probation with reference to the claims of the other parties; and in pronouncing decree upon the competing petitions, he is directed at the same time to dispose of the question of expenses.<sup>3</sup>

##### SUBSECTION (2).—*Title to Oppose.*

**437.** In the ordinary case of a service legitimacy was, and is, presumed.<sup>4</sup> Where the legitimacy of the petitioner requires to be established, he cannot be served heir until his status as an individual

<sup>1</sup> Sec. 33.

<sup>2</sup> Sec. 29.

<sup>3</sup> Sec. 35.

<sup>4</sup> Ersk. iii. 8, 66.

has been determined, and it is incompetent to determine this question in the Chancery Court.<sup>1</sup>

No person is entitled to appear and oppose a service before the Sheriff, who could not competently appear and oppose such service if the same were proceeding under the brieve of inquest according to the law and practice prior to 1847; and all objections must be presented in writing, and be disposed of by the Sheriff in a summary manner, either without or after an oral hearing.<sup>2</sup>

### SUBSECTION (3).—*Court.*

**438.** The Sheriff of Chancery holds his Court in any court-room within the Parliament House at Edinburgh, which may be assigned by the Lords of Session for that purpose, or in any other place that may be so assigned; <sup>3</sup> but since 1874 it has not been necessary for the Sheriff of Chancery to hold a Court for the disposal of unopposed petitions for service.<sup>4</sup> These are now taken in chambers, and it is only in opposed petitions that the Sheriff sits in open Court.

### SECTION 6.—PETITION FOR COMPLETION OF TITLE.

**439.** By s. 10 of the Conveyancing (Scotland) Act, 1874,<sup>5</sup> the heir or disponent of a proprietor of lands, who was neither infeft nor served, but vested only with a personal right by virtue of the Act, or any person acquiring a right from such heir or disponent, may make up his title by presenting to the Sheriff of Chancery, or the Sheriff of the county where the lands are situated, a petition, in the form of the statutory schedule, craving that he is entitled to be infeft in the said lands, and the petition proceeds in all respects as if it were a petition for special service.

### SECTION 7.—APPEAL FROM SHERIFF OF CHANCERY.

**440.** There is an appeal from decrees of the Sheriff of Chancery to the Court of Session, and his decree may also be reviewed by process of reduction there. Petitions for service, where opposed, may also be removed by appeal to the Court of Session for jury trial at any time before proof is begun to be taken by the Sheriff. See APPEAL (CIVIL).

### SECTION 8.—PRESENTER OF SIGNATURES.

**441.** Sec. 57 of the Conveyancing Act, 1874, provided that from the passing of the Act the duties of the office of Presenter of Signatures <sup>6</sup>

<sup>1</sup> *Grant, Petr.*, 1926 S.L.T. (Sh. Ct.) 13.

<sup>2</sup> Sec. 40, *Grant, Petr.*, *supra*.

<sup>3</sup> Sec. 50.

<sup>4</sup> Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), s. 57.

<sup>5</sup> 37 & 38 Vict. c. 94.

<sup>6</sup> See *Stair, Inst.* ii. v. 82 et 259; *Menzies, Conveyancing*, 837, *et seqq.*; *Jur. Styles*, 2nd ed. 1, 420; *Begg, Conveyancing Code*, 145, *et seqq.*, Clerk and Scrope, Court of Exchequer, 286; Sixth Report of Commission on Courts of Law in Scotland, appointed 1819.

should be discharged by the Sheriff of Chancery. This official of the Scottish Court of Exchequer, prior to the Act of 1874, had the duty of revising the drafts of all Crown charters and precepts or writs of *clare constat* required for the completion of titles to land held of the Crown; but as charters by progress have been abolished by the same statute,<sup>1</sup> and the number of Crown writs to be adjusted is in consequence very small, the additional duties thus imposed are by no means onerous. The preparation of original grants from the Crown, including charters of bastardy, charters of *ultimus hæres*, charters on forfeiture, and charters of mines and minerals under the Act 15th June 1592, may still, however, be necessary. If such a charter is required, a draft must be lodged with the Sheriff of Chancery and revised and docketed by him,<sup>2</sup> and this forms the warrant for the preparation of the charter.<sup>3</sup> If the party applying for the charter is dissatisfied with the draft as revised, or with the amount of duty claimed, or if the Sheriff refuses to revise the draft on the ground that the applicant has not set forth a title sufficient to shew that he has a right to obtain the charter claimed, an appeal may be taken to the Lord Ordinary in Exchequer causes.<sup>4</sup>

#### SECTION 9.—DIRECTOR OF CHANCERY.

##### SUBSECTION (1).—*Recording of Decrees.*

442. The Director of Chancery is the official charged with the duty of recording, in books kept for the purpose, decrees of service pronounced by the Sheriff of Chancery and Sheriffs of counties. After decree has been pronounced, the proceedings are transmitted, on the application of the petitioner for service, to the office of the Director of Chancery; and when the decree has been recorded and authenticated, an extract is prepared and delivered to the party; and where an heir is served to an ancestor in several separate estates in the same petition, separate extracts may be obtained applicable to one or more of said estates, provided a prayer to that effect is inserted in the petition for service. The decree of service so recorded and extracted has the full legal effect of a service duly retoured to Chancery, and is equivalent to the retour of a service under the brieve of inquest, and the extract of such decree is equivalent to the certified extract of the retour, according to the law and practice existing prior to the passing of the Service of Heirs Act, 1847.<sup>5</sup> A decree of service so recorded and extracted can only be set aside by a process of reduction in the Court of Session. An index and abridgment of the Record of Services is printed and published annually.<sup>6</sup>

<sup>1</sup> Sec. 4.

<sup>2</sup> Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), s. 64.

<sup>3</sup> *Ibid.*, ss. 65 and 72.

<sup>4</sup> 1868 Act, ss. 74, 77.

<sup>5</sup> 10 & 11 Vict. c. 47.

<sup>6</sup> Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), ss. 36, 37, 38.



SUBSECTION (2).—*Crown Writs.*

**443.** Crown writs, after being revised and approved by the Sheriff of Chancery, are officially transmitted to the office of the Director of Chancery, and are there engrossed and signed by the Director of Chancery, or his depute or substitute, and the writ, when signed, is recorded, and afterwards delivered to the party applying for the same. It is not now necessary to affix the Great Seal or other appropriate seal, unless the receiver of the writ requires it.<sup>1</sup> Charters, precepts, and other writs by progress having been rendered incompetent by the Conveyancing (Scotland) Act, 1874,<sup>2</sup> the only Crown charters or writs which now pass through the office are original charters, such as charters of incorporation, gifts of bastardy and *ultimus hæres*, charters of *novodamus*, and precepts or writs of *clare constat* from Chancery. The last have fallen into disuse, as they are granted only after a service, and the title of an heir with a decree of service can now be completed by recording the decree, or a notarial instrument expedite thereon.

SUBSECTION (3).—*Commissions and Brieves.*

**444.** The commissions of the Lord Advocate and Solicitor-General, the Lord High Commissioner to the General Assembly of the Church of Scotland, and other commissions passing the Great Seal, are issued by the Director of Chancery, as also are Government commissions of inquiry, brieves of terce and division, tutory, and insanity. The commissions of the Sheriff-Deputes of Scotland are also recorded in the office of the Director of Chancery, and he is Keeper of the Quarter Seal, otherwise called the Testimonial of the Great Seal. The writs passing this seal are (1) letters of tutory in favour of tutors-at-law, (2) letters of curatory, (3) letters of tutory-dative, (4) gifts of *ultimus hæres*, bastardy, and forfeiture. Duplicates of deeds by and in favour of the Board of Trade, the Commissioners of H.M. Works, and the Commissioners of H.M. Woods and Forests are deposited in the Chancery Office, and an abstract of them is recorded there.

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<sup>1</sup> Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), s. 64 *et seq.*

<sup>2</sup> 37 & 38 Vict. c. 94, s. 4.

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## CHARACTER.

*See* DEFAMATION; EVIDENCE.

# CHARGE.

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## SECTION 1.—DEFINITION.

**445.** A charge is the formal judicial written demand or requisition at the instance of a creditor, made by authority of the Sovereign when proceeding on a warrant of the Court of Session, or of the Sheriff when proceeding on a warrant of the Sheriff Court, calling on the debtor to pay a debt or to perform an obligation within a specified time, under pain of certain defined legal consequences. Originally required by statute as an equitable warning preliminary to execution by a creditor against the goods of his debtor, it came to be regarded as an act forming in itself a solemn part of diligence, and it falls within the scope of the law applicable to that branch of legal procedure.<sup>1</sup>

## SECTION 2.—WARRANTS OF CHARGE.

**446.** The foundation of a charge is an *ex facie* valid and regular warrant issued by a competent authority, and in the form recognised by law. This warrant may be contained in one or other of the following documents, viz.: (a) Extract of a decree or act pronounced by the Court of Session, or by the Court of Commission for Teinds, or by the Court of Justiciary<sup>2</sup> (see EXTRACT DECREE). (b) Extract of a decree proceeding on any deed, decree-arbitral, bond, protest of a bill or promissory note or banker's note, or any other obligation or document on which execution may competently proceed, recorded in the Books of Council and Session or of the Court of Justiciary.<sup>3</sup> (c) Extract of a

GENERAL AUTHORITIES.—Campbell, Citation and Diligence (1867), p. 179; Graham Stewart, Diligence (1898), pp. 290, 410, 424; Mackay, Manual (1893), pp. 7, 421; Dove Wilson, Sheriff Court Practice (1891), p. 332; Lewis, Sheriff Court Practice (1923), pp. 149, 210; Wallace, Sheriff Court Practice (1909), p. 358; Bell, Conveyancing, i. 522; Glegg, Reparation (1905), p. 220; Juridical Styles (1907), iii. 329; Scots Style Book (1903), iii. 95; Maclaren, Bill Chamber Practice (1915), p. 8.

<sup>1</sup> Act 1669, c. 4; Stair, iv. 47, 29; Bell, Prin., s. 2286.

<sup>2</sup> Court of Session Act, 1810 (50 Geo. III. c. 112), ss. 1–13; Debtors (Scotland) Act, 1838 (1 & 2 Vict. c. 114), ss. 1 and 3; Court of Session (Extracts) Act, 1916 (6 & 7 Geo. V. c. 49); C.A.S., B, vi.; C.A.S., H, ii., as regards decrees of locality.

<sup>3</sup> Debtors (Scotland) Act, 1838 (1 & 2 Vict. c. 114), ss. 1 and 3; Writs Execution (Scotland) Act, 1877 (40 & 41 Vict. c. 40), ss. 1 and 3; Land Registers (Scotland) Act, 1868 (30 & 31 Vict. c. 64), s. 12; Conveyancing (Scotland) Act, 1924 (14 & 15 Geo. V. c. 27), s. 10 (5).

decree of the Sheriff Court.<sup>1</sup> (*d*) Extract of a decree of registration in the Sheriff Court books proceeding on a deed, protest, or obligation or document on which execution may competently proceed.<sup>2</sup> (*e*) Decree under the Small Debt (Scotland) Act, 1837, s. 13, or the Small Debt Amendment (Scotland) Act, 1889. (*f*) Extract of decree for debts due to the Crown, the form of which is regulated by the Court of Exchequer Act, 1856, s. 38, and Schedule G.<sup>3</sup> (*g*) Certificate of judgment of the Courts of King's Bench, Common Pleas, or Exchequer at Westminster or Dublin respectively, or of a superior Court in any part of the Dominions outside the United Kingdom, registered for execution under the Judgments Extension Act, 1868, s. 2, and Administration of Justice Act, 1920, s. 9. (*h*) Certificate of judgment of the inferior Courts, as defined by the statute, of England and Ireland, registered under the Inferior Courts Judgments Extension Act, 1882, and C.A.S. L, ix. (*i*) Letters of horning passing the Signet; previous to the Debtors (Scotland) Act, 1838, these letters were necessary as warrants for a charge, but their use is now practically superseded by extracts of decrees of Court or of registration in Court books issued under the authority of the statutes above mentioned, and while they are now still competent, it is only in certain exceptional instances that they are necessary. (*j*) Order of the Courts of England or Ireland for payment of money in the winding up of companies, or in bankruptcy, registered in the Bill Chamber.<sup>4</sup> (*k*) Decree of a Court of Summary Criminal Jurisdiction, where it is ordered that a penalty is to be recovered by civil diligence, the proceedings being as upon a small debt decree.<sup>5</sup> (*l*) Warrant by the Clerk of the Bills or the Sheriff-Clerk on application to execute diligence on a heritable security transmitted by virtue of s. 47 of the Conveyancing (Scotland) Act, 1874 and the Conveyancing (Scotland) Act, 1924, s. 15.

**447.** In extracts issued under the Debtors (Scotland) Act, 1838, s. 8, the warrant is inserted at length and is authority to charge the debtor or obligant within the days of charge, under the pain of poinding and, where competent, imprisonment, and to arrest and poind and for that purpose to open shut and lockfast places. By the Writs Execution Act, 1877, and the Sheriff Courts Extracts Act, 1892, shorter forms were provided which had the same meaning and effect. The warrant to charge and to effect other diligence is now prescribed by the Court of Session (Extracts) Act, 1916, in the following terms: "And the said Lords grant warrant for all lawful execution hereon." In extracts issued under the Lands Registers (Scotland) Act, 1868, the unabbreviated warrant is still necessary.

<sup>1</sup> Debtors (Scotland) Act, 1838 (1 & 2 Vict. c. 114), s. 9; Sheriff Courts (Scotland) Extracts Act, 1892 (55 & 56 Vict. c. 17).

<sup>2</sup> Debtors (Scotland) Act, 1838 (1 & 2 Vict. c. 114), s. 9; C.A.S. B, vi.

<sup>3</sup> *Borthwick v. Lord Advocate*, 1862, 1 M. 94.

<sup>4</sup> Companies Consolidation Act, 1908 (8 Edw. VII. c. 69), s. 180; Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), ss. 121, 122; C.A.S., E, iii. 4; *Wilson v. Robertson*, 1884, 11 R. 893; *Johnstone's Trs. v. Roose*, 1884, 12 R. 1.

<sup>5</sup> Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. c. 65), ss. 49, 52.

## SECTION 3.—REQUISITES OF CHARGE.

**448.** A charge is held to be diligence,<sup>1</sup> and must be effected in all respects in conformity with the warrant on which it proceeds; and the warrant also must itself be in order. Any irregularity or informality in the warrant or in the charge may lead to suspension of the proceedings and to the charger being found liable in damages. Diligence on an extract of a protest in which the date of the protest differed from the date of noting the bill on which it proceeded was held inept.<sup>2</sup> A charge for a sum in a recorded protest of a bill which has been paid, or for a sum for which decree has been illegally taken, is an actionable wrong, and the plea of privilege is not available.<sup>3</sup> A charge may be abandoned or departed from in writing and a new charge given.<sup>4</sup>

**449.** A charge may be written, or partly written and partly printed.<sup>5</sup> There is no statutory form of the schedule of charge. The essential requirement is that it be so expressed as to convey clearly to the person charged what he is required to do, to inform him correctly of the warrant by virtue of which the demand is made, and to certiorate him of the legal consequences which may ensue if he fails to obey the charge,<sup>6</sup> the terms in which all this should be done being now settled by practice. The following is the usual form applicable to a Court of Session decree:

I, A. B., messenger-at-arms, by virtue of an extract obtained before the Lords of Council and Session upon the                      day of                      and warrant of the said Lords thereon, extracted the                      day of                      both in the year                      , at the instance of C. D. (*designation*), pursuer, against E. F. (*designation*), defender, in His Majesty's name and authority, lawfully charge you, the said E. F., defender, to make payment of the sum of                      ; together with the interest thereof at the rate of                      from the                      day of                      , and in time coming till paid; and of the sum of                      , being the amount of expenses of process, as taxed by the Auditor of the Court of Session; and of the sum of                      , being the dues of extracting the said decree, and that to the said C. D., pursuer, within fifteen days next after the date of this my charge, under the pain of poinding. This I do upon the                      day of                      one thousand nine hundred and                      years before and in presence of                      , residenter in                      , witness to the premises.

*(Signed by messenger only.)*

**450.** The particulars which should be found correctly set forth in the schedule of charge are the following: (a) The name of the messenger or officer executing it.<sup>7</sup> (b) A reference to the warrant on which it proceeds, specifying the nature and date of extract and of the decree, or the

<sup>1</sup> *Gibb v. Edinburgh Brewery Co.*, 1873, 11 M. 705.

<sup>2</sup> *M'Pherson v. Wright*, 1885, 12 R. 942.

<sup>3</sup> *Gibb v. Edinburgh Brewery Co.*, *supra*; *MacRobbie v. M'Lellan's Trs.*, 1891, 18 R. 470.

<sup>4</sup> *Clark v. Hamilton & Lee*, 1875, 3 R. 166.

<sup>5</sup> Debtors (Scotland) Act, 1838 (1 & 2 Vict. c. 114), s. 32.

<sup>6</sup> *Williamson v. M'Lachlan*, 1866, 4 M. 1091.

<sup>7</sup> *Paterson v. Scottish Insurance Commrs.*, 1915, 2 S.L.T. 178.



document whereon it proceeds, with the names and descriptions of parties thereto. The statement of dates must be accurate—the omission of a statement of the month was held to be fatal.<sup>1</sup> But a clerical error where the correct fact was apparent from the context was held not fatal.<sup>2</sup> An objection that the execution of charge did not give the date of the extract registered lease on which the extract proceeded was repelled.<sup>3</sup> In a charge on a Sheriff Court decree it was held not necessary to state the date of extracting it, there being no statutory requirement that the extract should bear the date of extracting;<sup>4</sup> (but see Sheriff Courts (Scotland) Extracts Act, 1892, where the form of extract provided gives the date of extracting) and apparently failure to narrate the date of extracting if the extract were otherwise in order would not be fatal. (c) The party at whose instance the charge is given. This may be either the original creditor in the decree or obligation, or a person who has acquired right to the warrant. An assignee, executor, trustee, or other person acquiring right to an extract must first obtain a fiat thereon, which is granted by the Clerk of the Bills, or, in the case of Sheriff Court extract, by the Sheriff-Clerk, upon a minute craving authority endorsed on the extract and signed by the applicant or his agent, production being made of the assignation, confirmation, or other legal evidence of his title.<sup>5</sup> A statutory provision vesting a bond to trustees in their successors in office does not render the fiat unnecessary.<sup>6</sup> The form of minute should be carefully followed, and the place and date of granting should be stated therein.<sup>7</sup> Unless the proper authority has been obtained, a charge at the instance of a party other than the one named in the decree is null.<sup>8</sup> If the charge is at the instance of a descriptive firm, the names of the partners must be added. A charge may be given by a foreigner without a mandatary being joined with him.<sup>9</sup> (d) The name and designation of the debtor or obligant—the person who is charged. These must be correctly set forth, and if the debtor is designed in a special character in the warrant, the charge should be framed in similar terms.<sup>10</sup> The extract of a decree against a person as judicial factor is a warrant for a charge or for other diligence against him only in such capacity, not for diligence against his personal

<sup>1</sup> *Beattie v. M'Lellan and Nelson*, 1844, 6 D. 1088; see also as to error in specifying date of the decree, *Campbell v. Cassils and Finlayson*, 1849, 12 D. 177; and *Williamson v. M'Lachlan*, 1866, 4 M. 1091, where several decrees being referred to in the charge, the date of one only was held sufficient; and *Graham v. Bell*, 1875, 2 R. 972, in which in an arrestment a date of decree given as "thirteenth" when it should have been "thirtieth" was held fatal.

<sup>2</sup> *Henderson v. Rollo*, 1871, 10 M. 104.

<sup>3</sup> *Dimpsey v. M'Farlane's Trs.*, 1863, 1 M. 1126.

<sup>4</sup> *Williamson v. M'Lachlan*, *supra*.

<sup>5</sup> Debtors (Scotland) Act, 1838 (1 & 2 Vict. c. 114), s. 7, Schedule 5 (Court of Session extract), and s. 12, Schedule 9 (Sheriff Court extract).

<sup>6</sup> *Mitchell v. St Mungo Lodge of Ancient Shepherds*, 1916 S.C. 689.

<sup>7</sup> *Jameson v. Wilson*, 1853, 15 D. 414.

<sup>8</sup> *Gillespie v. M'Linnachie and Ellis*, 1894, 2 S.L.T. 291.

<sup>9</sup> *Ross v. Shaw*, 1849, 11 D. 984.

<sup>10</sup> *Campbell v. Gordon*, 1844, 6 D. 1030.

estate.<sup>1</sup> The effect of errors in the names of parties in the proceedings appears to vary with the nature of the error and the actings of the parties.<sup>2</sup> A decree against a company includes impliedly a decree against all the partners thereof, and so individual partners of a company may be charged for a company debt on an extract decree or protest against the company, although the individual names of such partners do not appear in the warrant;<sup>3</sup> but such a decree would not warrant a charge against a person who is not actually a partner but who may be liable as holding himself out as such.<sup>4</sup> A decree in the Sheriff Court under the Sheriff Court Act, 1907, against a club in its descriptive name does not warrant a charge on an individual member of the club.<sup>5</sup> The same principle applies to a charge on an extract registered protest or other deed.<sup>6</sup> If the debtor is a minor, his tutors and curators must be charged edictally along with him. If the debtor is a married woman, the charge will be on her alone; her husband does not now require to be charged as her curator and administrator-in-law.<sup>7</sup> The rules as to citation of various companies and public bodies are applicable to the methods of giving a charge. In the case of a decree of modification and locality, form of extract is given in the Codifying Act of Sederunt, H, ii., Schedules I. and II., and the warrant is to charge the titulars and tacksmen of the teinds, heritors and other intromitters with the rents and teinds of the parish, the individual debtors not being specified. This is warrant for a charge for payment of the portion of stipend applicable to each, conform to the division and locality. (e) A statement of the authority under which the charge is made, viz. in His Majesty's name and authority, or by authority of the Sheriff, as the case may be. (f) A statement of what the person is charged to do; if it is to pay money, the sum, interest, and expenses must be specifically stated; if the charge is to fulfil an obligation, or to perform an act, the particular requirement must be distinctly specified as in the warrant. Diligence for more than is due at the time is bad, and may subject the charger in damages, but this liability does not attach to an agent instructing the charge, if he was ignorant of the error.<sup>8</sup> If any sum has been paid to account since the decree was granted, credit therefor must be given.<sup>9</sup> A charge may be given for a penal sum stipulated in a bond, the actual sum due being modified in a suspension.<sup>10</sup> A charge for a specific sum due under the deduction of sums to be otherwise recovered was sustained.<sup>11</sup> A charge for a larger sum than is due may be restricted or it may be suspended *quoad excessum* only,<sup>12</sup> and remain

<sup>1</sup> *Craig v. Hogg*, 1896, 24 R. 6.

<sup>2</sup> *Spalding v. Valentine & Co.*, 1883, 10 R. 1092; *Brown v. Rodger*, 1884, 12 R. 340; *Cruickshank v. Gow & Sons*, 1888, 15 R. 326.

<sup>3</sup> *Knox v. Martin*, 1847, 10 D. 50.

<sup>4</sup> *Brember v. Rutherford*, 1901, 4 F. 62.

<sup>5</sup> *Aitchison v. M'Donald*, 1911 S.C. 174.

<sup>6</sup> *Drew v. Lumsden*, 1865, 3 M. 384; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 4 (2).

<sup>7</sup> Married Women's (Scotland) Property Act, 1920 (10 & 11 Geo. V. c. 64).

<sup>8</sup> *Henderson v. Rollo*, 1871, 10 M. 104.

<sup>9</sup> *M'Martin v. Forbes*, 1824, 3 S. 275.

<sup>10</sup> *Borthwick v. Lord Advocate*, 1862, 1 M. 94.

<sup>11</sup> *Richan v. Hill*, 1832, 11 S. 237.

<sup>12</sup> *Dick v. Murison*, 1845, 8 D. 1.

valid as a charge otherwise.<sup>1</sup> A decree *ad factum præstandum* must be such as to leave no doubt as to the measure of the obligation and to warrant an effective charge for performance.<sup>2</sup> A charge given under an extract registered lease to implement the obligations in a lease without specification was held incompetent, and it was doubted whether a charge to perform any specific act under such a warrant would be competent.<sup>3</sup> (g) The party to whom payment is to be made must be correctly stated.<sup>4</sup> A charge having the payee's name blank was suspended.<sup>5</sup> (h) The time within which the charge has to be obeyed. Failure to specify the proper number of days forming the legal appropriate *induciæ* renders the charge null, and may be a ground for damages against the creditor.<sup>6</sup> (i) A statement of the diligence that may competently follow as a consequence of failure to obey the charge, *i.e.* poiding and, in cases where it may be competent, imprisonment. A charge is illegal which states as a consequence imprisonment where that form of diligence cannot competently follow.<sup>7</sup> (j) The date on which the charge is given. The omission of the month was held fatal to a charge.<sup>8</sup> (k) The name and designation of the witness to the charge.<sup>9</sup> A failure to comply with this requirement was held not to infer nullity.<sup>10</sup>

#### SECTION 4.—*INDUCIÆ.*

**451.** The *induciæ* vary according to the nature of the warrant, and are as follow: (1) On a Court of Session decree, fifteen days if the debtor is within Scotland, forty days if the debtor is in Orkney or Shetland, and fourteen days if the debtor is furth of Scotland.<sup>11</sup> (2) On an extract registered protest of a bill or promissory note, six days, or, in the case of a Court of Session protest against a party furth of Scotland, fourteen days, or in Orkney or Shetland, forty days.<sup>12</sup> (3) On an extract of a deed which bears a consent to registration for execution on a six days' charge or in the equivalent statutory form, six days, or if the debtor is furth of Scotland, fourteen days.<sup>13</sup> (4) On an extract of a deed recorded in the Register of Sasines with a clause of consent and warrant of registration for execution in statutory form, six days, or if the debtor is furth

<sup>1</sup> *Wilson v. Stronach*, 1862, 24 D. 271; *Haughhead Coal Co. v. Gallocher*, 1903, 11 S.L.T. 156.

<sup>2</sup> *Middleton v. Leslie*, 1892, 19 R. 801.

<sup>3</sup> *Hendry v. Marshall*, 1878, 5 R. 687.

<sup>4</sup> *Mackenzie v. Cameron*, 1853, 15 D. 664; *Taylor v. Macdonald*, 1854, 16 D. 378.

<sup>5</sup> *Hardie v. Brown, Barker & Bell*, 1907, 15 S.L.T. 539; see also *Campbell v. Gordon*, 1844, 6 D. 1030.

<sup>6</sup> *Smith & Co. v. Taylor and Ors.*, 1882, 10 R. 291.

<sup>7</sup> *Mackay v. Resolis Parish Council*, 1899, 1 F. 521; *Glenday v. Johnston*, 1905, 8 F. 24; *Hardie v. Brown, Barker & Bell*, *supra*.

<sup>8</sup> *Beattie v. M'Lellan & Nelson*, 1844, 6 D. 1088.

<sup>9</sup> Act, 1693, c. 12.

<sup>10</sup> *Shiells v. Reid*, 1829, 7 S. 535.

<sup>11</sup> A.S., 24th December 1838; Act 1685, c. 56; Court of Session Act, 1868 (31 & 32 Vict. c. 100), s. 14.

<sup>12</sup> Act 1681, c. 86; 1685, c. 56; 1696, c. 36; Court of Session Act, 1868 (31 & 32 Vict. c. 100), s. 14.

<sup>13</sup> Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), s. 138; Court of Session Act, 1868, s. 14.



of Scotland, twenty-one days.<sup>1</sup> (5) On a decree of the Teind Court, ten days, or if the debtor is furth of Scotland, sixty days.<sup>2</sup> (6) On a decree of the Exchequer Court, six days.<sup>3</sup> (7) On a decree of the ordinary Sheriff Court, seven days, or against a party in Orkney or Shetland or furth of Scotland, fourteen days.<sup>4</sup> These provisions do not apply to proceedings in the Small Debt Court or to summary ejections.<sup>5</sup> Where a decree ordering consignation did not specify a period within which the order was to be implemented, it was held that the Act of 1892 referred to authorised warrant in the extract of a charge of seven days.<sup>6</sup> (8) On a decree of the Small Debt Court, ten days,<sup>7</sup> or against a party furth of Scotland, fourteen days.<sup>8</sup> (9) On a decree of removing, forty-eight hours prior to the term or date specified in the extract or forty-eight hours after the charge if given later.<sup>9</sup> (10) On an extract certificate registered under the Judgments Extension Act, 1868, fifteen days, or if against a party in Orkney or Shetland, forty days, or a party furth of Scotland, possibly fourteen days,<sup>10</sup> and on a certificate under the Inferior Courts Judgments Extension Act, 1882, fifteen days.<sup>11</sup> (11) On letters of horning—on a decree not containing consent to registration on a six days' charge, seven days if the defender is within Scotland, and fourteen days if in Orkney or Shetland or furth of Scotland; on a decree containing consent to the above shorter *inducia*, six days, whether in Scotland, Orkney or Shetland, or furth of Scotland; and on a registered protest, six days if within Scotland, and fourteen days if in Orkney or Shetland or furth of Scotland.<sup>12</sup>

#### SECTION 5.—PROCEDURE IN CHARGING.

**452.** A charge embodied in a writing, signed by the messenger or officer, or other person authorised to execute it, and a witness, may be executed in one or other of the following ways, the procedure in serving being the same as in execution of service of a summons. The warrant must be in the hands of the executor at the time and exhibited to the debtor if required. (1) By the officer delivering it to the debtor personally. (2) Where the debtor cannot be found personally after inquiry, but where access to his house is obtained, by the officer leaving the schedule with a person in his dwelling-place, who is termed in the execu-

<sup>1</sup> Land Registers (Scotland) Act, 1868 (31 & 32 Vict. c. 64), s. 12, Schedule B.

<sup>2</sup> A.S., 4th March 1840, C.A.S., H, ii, 26, Schedules 1, 2.

<sup>3</sup> Court of Exchequer Act, 1856 (19 & 20 Vict. c. 56), s. 28.

<sup>4</sup> Sheriff Courts (Scotland) Extracts Act, 1892 (55 & 56 Vict. c. 17), s. 7.

<sup>5</sup> Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51), Schedule 1, r. 15.

<sup>6</sup> *M'Lintock v. Prinzen & Van Glabbeek*, 1902, 4 F. 948.

<sup>7</sup> Small Debt Act, 1837 (1 Vict. c. 41), s. 13.

<sup>8</sup> Act of 1907, Schedule 1, r. 15.

<sup>9</sup> A.S., 27th January 1830; Sheriff Courts (Scotland) Extracts Act, 1892, s. 7.

<sup>10</sup> A.S., 11th July 1871; A.S., 7th March 1883; Act, 1685, c. 56; Court of Session Act, 1868, s. 14; C.A.S., B, vi.

<sup>11</sup> C.A.S., L, ix.

<sup>12</sup> Court of Session Act, 1868, s. 14; Titles to Land Consolidation Act, 1868, s. 138; Act, 1681, c. 20; 1693, c. 36.



tion a servant.<sup>1</sup> (3) When admittance to the dwelling-house cannot be obtained after giving six audible knocks, by the officer affixing the charge to the door of the house, or putting it in the keyhole.<sup>1</sup> (4) Execution against a company is effected by delivering the charge to a partner or servant within its place of business. The extract of a decree pronounced in the Sheriff Court or of a decree proceeding upon any obligation or document on which execution may pass recorded in the Sheriff Court books against an individual or individuals, or corporation, or association, under a firm, trading, or descriptive name, is a warrant for diligence against such parties under such name at the principal place where such business is carried on, including the place of business or office of the clerk or secretary, or, where its principal place of business is furth of Scotland, at any place of business in Scotland.<sup>2</sup> (5) If the debtor is furth of Scotland, by delivering the charge at the office of the Keeper of Edictal Citations at Edinburgh.<sup>3</sup> One schedule is apparently sufficient for several parties cited edictally at one time, provided it bear on the face of it that it is delivered for all and each of the parties named.<sup>4</sup> In the case of a charge on a Sheriff Court extract, if the debtor has a known residence or place of business in England or Ireland, a copy of the decree and charge, on fourteen days' *inducie*, requires to be posted to him in a registered letter at such address.<sup>5</sup> In all cases one witness is necessary, except for a charge under the Small Debt Acts, which can be given without a witness.<sup>6</sup> (6) Service of a charge by post is not competent except to the limited extent to be referred to, the provisions of the Citation Amendment Act, 1882, not being applicable to diligence.<sup>7</sup>

**453.** The power to serve by post a charge on a decree for payment of money granted in the Small Debt Court, which was first conferred by the Sheriff Courts (Scotland) Act, 1907, s. 49, has now been extended. Such a charge, where the place of execution is in any of the islands of Scotland or in any county where there is no resident sheriff-officer, or is more than twelve miles distant from the seat of the Court where the decree was granted, may be given by registered letter in accordance with the provisions of the Execution of Diligence (Scotland) Act, 1926. These, shortly stated, are: (a) The letter containing the schedule of charge is to be sent by post to the known residence or place of business of the person against whom the charge is to be executed, or to the last-known address of the debtor if it continues to be his legal domicile or proper place of citation. (b) The letter may be sent by a sheriff-officer who would be

<sup>1</sup> Act, 1540, c. 75.

<sup>2</sup> Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51), Schedule 1, rr. 11 and 151.

<sup>3</sup> Court of Session Act, 1825, (6 Geo. IV. c. 120) s. 51; A.S., 24th December 1838, s. 7; Court of Session Act, 1850 (13 & 14 Vict. c. 36), s. 22; Sheriff Courts Act, 1907, Schedule 1, r. 15.

<sup>4</sup> A.S., 11th July 1828, s. 22, C.A.S., C, i. 4, 5.

<sup>5</sup> Sheriff Courts Act, 1907, Schedule 1, r. 15.

<sup>6</sup> Debtors (Scotland) Act, 1838 (1 & 2 Vict. c. 114), s. 32; Citations (Scotland) Act, 1846 (9 & 10 Vict. c. 67); Small Debt Amendment Act, 1889 (52 & 53 Vict. c. 26), s. 11.

<sup>7</sup> *Gow & Son v. Thomson*, 1895, 1 Adam 534.

entitled to execute the charge prior to the Act, or by a messenger-at-arms resident in the sheriffdom in which the place of execution is situated, or if there is no such sheriff-officer or messenger, by a law agent enrolled in the sheriffdom. (c) On the back of the letter there has to be written or printed the following notice, or a notice to the like effect: "If delivery of this letter cannot be made, it is to be returned immediately to (give the name and address of law agent, messenger-at-arms, or sheriff-officer concerned)." (d) The execution is to be accompanied by the Post Office receipt. (e) Delivery of the letter in accordance with the provisions of the Act constitutes a valid execution of the charge. Where, in any proceedings in which the validity of the charge is in question, there is produced an acknowledgment or certificate of delivery by the Postmaster-General in pursuance of regulations under the Post Office Act, 1908, the letter is presumed to have been delivered to the debtor at the address and on the day specified in such acknowledgment or certificate, unless it is proved by the debtor or any person having an interest that the registered letter was never in fact delivered to or received by the debtor or any person with his authority, express or necessarily implied, or was so delivered on some other day. (f) Where, in any proceedings in which the validity of such charge is in question, it is proved that the registered letter was duly tendered at the proper address of the debtor, but was refused by him or by some person with his authority, express or necessarily implied, the Court may, if it think fit, hold such tender and refusal equivalent to delivery.<sup>1</sup>

**454.** When a charge or other diligence on a Sheriff Court extract is to be executed outwith the county from which it is issued, a warrant of concurrence must be obtained which may be granted as may be appropriate either in the Bill Chamber or by the Sheriff-Clerk of the county where the debtor is, or where his moveables are situated. The warrant is obtained by lodging the extract and a minute craving concurrence.<sup>2</sup> While the Sheriff Courts Act of 1907 has abolished the necessity of a warrant of concurrence in the case of citation, it has not included the case of diligence. The warrant of concurrence is not necessary in the case of decrees of the Small Debt Court.<sup>3</sup> An officer of one county may not serve a charge in another county though in the same sheriffdom.<sup>4</sup>

#### SECTION 6.—EXECUTION OF CHARGE.

**455.** The charge on Court of Session extracts is executed by a messenger-at-arms, and on Sheriff Court extracts by a messenger-at-arms or sheriff-officer.<sup>5</sup> Authority may be given by the Court of Session for execution by a sheriff-officer in districts where there is no messenger-at-

<sup>1</sup> Execution of Diligence (Scotland) Act, 1926 (16 & 17 Geo. V. c. 16) s. 2.

<sup>2</sup> Debtors (Scotland) Act, 1838 (1 & 2 Vict. c. 114), s. 13.

<sup>3</sup> Small Debt Amendment Act, 1889 (52 & 53 Vict. c. 26), s. 11.

<sup>4</sup> *Brydon v. Atkinson*, 1893, 1 S.L.T. 261.

<sup>5</sup> Debtors (Scotland) Act, 1838 (1 & 2 Vict. c. 114), Schedule I: Sheriff Courts (Scotland) Extracts Act, 1892 (55 & 56 Vict. c. 17), s. 8.

arms; <sup>1</sup> without such authority, a charge by an officer was held null.<sup>2</sup> The necessity for this application to the Court is removed to a considerable extent by the provisions of the Execution of Diligence (Scotland) Act, 1926, which in certain cases allow a sheriff-officer to act as a messenger, and further confer power on the Sheriff to make an *ad hoc* appointment of a person to execute writs. In a county in which there is no resident messenger-at-arms, or in any of the islands of Scotland, a sheriff-officer duly authorised to practise in any part of the sheriffdom comprising such county or island has all the powers of a messenger-at-arms in regard to the service of any summons, writ, citation, or other proceeding, or to the execution of or diligence on any decree, warrant, or order.<sup>3</sup> A charge under a decree or warrant of any Court may in certain cases also be executed by any person authorised by the Sheriff. Where an extract decree or warrant granted by any Court in Scotland is presented to the Sheriff within whose jurisdiction such decree or warrant requires to be executed, and the Sheriff is satisfied that no messenger-at-arms or sheriff-officer is reasonably available to execute such decree or warrant, the Sheriff may, if he thinks fit, grant authority to any person whom he may deem suitable (but not including the law agent of the party presenting the decree or warrant) to execute such decree or warrant, and the person so authorised has, as regards any diligence or execution competent on such decree or warrant, all the powers of a messenger-at-arms, or sheriff-officer.<sup>3</sup> The optional method of serving by post, either by an officer or by a law agent, charges on decrees under the Small Debt Acts has been referred to above.

**456.** A certificate technically known as the execution, which is a narration of the schedule of charge served on the debtor, and contains the same particulars, states also the time of service, and the particular manner in which the charge was given. Where, owing to the citation being edictal, the charge is sent by post, this fact also has to be stated.<sup>4</sup> The precise method in which service is effected must be set forth.<sup>5</sup> A defective execution may be superseded by obtaining one that is regular.<sup>6</sup> The officer is required to return an execution in terms of Schedule No. 2 annexed to the Act, or as near to the form thereof as circumstances will permit. The execution, when written on the decree, may refer to the parties and sums as therein stated, without narrating them at length.<sup>7</sup> When the execution is written on the extract, a form adapted from that of Schedule 2 is given in the Act of Sederunt, and is as follows:—

Upon the                      day of                      , I, messenger-at-arms (*or* officer of Court),  
by virtue of the within extract and warrant at the instance of the within-named

<sup>1</sup> *Robertson*, 1893, 20 R. 712; *Whyte Ridsdale & Co.*, 1912 S.C. 1095.

<sup>2</sup> *Harper v. Inch and Riddell*, 1883, 20 S.L.R. 866.

<sup>3</sup> Execution of Diligence (Scotland) Act, 1926 (16 & 17 Geo. V. c. 16).

<sup>4</sup> Sheriff Courts Act, 1907 (7 Edw. VII. c. 51), Schedule 1, r. 15.

<sup>5</sup> *Stewart v. Macdonald*, 1860, 22 D. 1514.

<sup>6</sup> *Hamilton v. Monkland Iron and Steel Co.*, 1863, 1 M. 672.

<sup>7</sup> *Hanna v. Neilson*, 1849, 11 D. 941; Act, 1686, c. 4; Debtors (Scotland) Act, 1838, ss. 3, 32, Schedule 2; C.A.S., B, vi.



and designed A., against the also within-named and designed B., passed, and in His Majesty's name and authority lawfully charged the said B. to make payment of the within-mentioned sum or sums of money, principal, interest, and expenses, or to implement and perform the haill obligations within mentioned [*or both to pay and perform as the extract and warrant may require*], and that to the said B., within

days next after the date of my said charge, under the pain of poiding (and imprisonment). This I did by delivering to [*or leaving for, as the case may be*] the said B. personally apprehended, a full copy of the within extract [*say "so far as incumbent upon him" in case there be other debtors or obligants in the extract.*] before and in presence of C., witness to the premises.

(*Officer's signature.*)

(*Witness's signature.*)

Errors in the execution, if merely clerical, and if from the context there can be no mistake as to what is meant, are not regarded as fatal.<sup>1</sup>

457. The execution is the only proper evidence of a charge, and unless there are in it patent irregularities, it is held good until it is reduced.<sup>2</sup> In proceedings in the Sheriff Court, objections to an execution, sufficient to sustain reduction, could probably be stated, by way of exception, under the Sheriff Courts (Scotland) Act, 1907, Schedule 1, r. 50.<sup>3</sup> In an application for sequestration, where the execution of a charge on the debtor had been wrongfully destroyed, extrinsic evidence of the charge having been given was admitted to establish notour bankruptcy.<sup>4</sup>

#### SECTION 7.—CONSEQUENCES OF CHARGE.

458. A charge is not a necessary preliminary to the diligence of arrestment or to the use of inhibition. A charge is necessary (under limited exceptions of certain cases under the Small Debt Acts as mentioned below) previous to poiding or imprisonment.

459. The following consequences result from a charge: (1) On the expiry of the days of charge without its having been implemented, (*a*) if the charge is to pay a sum of money, a poiding of the debtor's moveable effects may be carried out,<sup>5</sup> and in the cases in which it is competent, proceedings may be taken to obtain warrant to imprison the debtor; (*b*) if the decree is one *ad factum præstandum*, warrant to imprison may be at once obtained in the Bill Chamber or the Sheriff Court, as the case may be; (*c*) if the decree is for aliment, an expired charge without payment is the foundation for an application to the Sheriff for warrant for imprisonment.<sup>6</sup> In cases under the Small Debt Acts when the debtor has been personally present at the pronouncing of judgment, a charge is not necessary; diligence may proceed on the lapse of ten days after

<sup>1</sup> *Smyth v. Walker*, 1867, 5 M. 552.

<sup>2</sup> *Stewart v. Macdonald*, 1860, 22 D. 1514; *Clark v. Hamilton and Lee*, 1875, 3 R. 166.

<sup>3</sup> *Scott v. Cook*, 1886, 24 S.L.R. 34.

<sup>4</sup> *Drummond v. Chinas Tiles and Mosaics, Ltd.*, 1909 S.C. 1049.

<sup>5</sup> Debtors (Scotland) Act, 1838, s. 4.

<sup>6</sup> Debtors (Scotland) Act, 1880 (43 & 44 Vict. c. 34), s. 4; Civil Imprisonment (Scotland) Act, 1882 (45 & 46 Vict. c. 42), ss. 3, 4.



the decree without a charge.<sup>1</sup> An order for delivery under a small debt decree is enforceable without further warrant than the extract decree and charge.<sup>2</sup> (2) Insolvency concurring with a duly executed charge for payment where a charge is necessary, followed by the expiry of the days of charge without payment, constitutes notour bankruptcy.<sup>3</sup> (3) Upon registration in the Register of Hornings of the execution of charge, within year and day of the expiry of the charge, along with the extract on which it proceeds, the debt and interest are accumulated into a capital sum, on which interest thereafter runs.<sup>4</sup> (4) Upon the lapse of sixty days after the expiry of a charge on a decree granted in absence in the Court of Session after personal service on the defender or the entering of appearance for the defender with his authority, the decree is entitled to all the privileges of a decree *in foro* against such defender.<sup>5</sup> The lapse of six months after a charge on a decree in absence in the Sheriff Court, after personal service of the charge has the like effect.<sup>6</sup>

**460.** A charge on a small debt decree expires after the lapse of a year.<sup>7</sup> There is no similar limitation of duration of a charge on an ordinary decree.<sup>8</sup>

#### SECTION 8.—SUSPENSION OF CHARGE.

**461.** An illegal, irregular, or defective charge, or threatened charge, may be suspended by application presented in the form of a note of suspension or a note of suspension and interdict in the Bill Chamber. Suspensions of charges or threatened charges upon Sheriff Court decrees, or upon decrees of registration proceeding upon bonds, bills, contracts, or other obligations registered in the books of the Sheriff Court, the Books of Council and Session, or any others competent, where the debt, exclusive of interest and expenses, does not exceed £50, are competent in the Sheriff Court of the domicile of the person charged.<sup>9</sup> Where suspension is competent in the Sheriff Court, it would apparently be incompetent in the Court of Session, unless in the case of a fundamental nullity.<sup>10</sup> (See SUSPENSION.)

<sup>1</sup> Small Debt Act, 1837 (1 Vict. c. 41), s. 13; *Shiell v. Mossman*, 1871, 10 M. 58.

<sup>2</sup> *Stewart v. M'Dougall*, 1908 S.C. 315.

<sup>3</sup> *Black v. Humphrey*, 1911 S.C. 618; Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), s. 5. (See BANKRUPTCY.)

<sup>4</sup> Debtors (Scotland) Act, 1838 (1 & 2 Vict. c. 114), s. 5 (Court of Session, etc., decree), s. 10 (Sheriff Court decree).

<sup>5</sup> Court of Session Act, 1868 (31 & 32 Vict. c. 100), s. 24.

<sup>6</sup> Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51), Schedule 1, r. 25.

<sup>7</sup> Small Debt Act, 1837 (1 Vict. c. 41), s. 13.

<sup>8</sup> *Wilson v. Stronach*, 1862, 24 D. 271.

<sup>9</sup> Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51), s. 5 (5), Schedule 1, r. 123.

<sup>10</sup> *Aitchison v. M'Donald*, 1911 S.C. 174; *Brown & Critchley, Ltd. v. Decorative Art Journals Co.*, 1922 S.C. 192.

## CHARGÉ D'AFFAIRES.

*See* INTERNATIONAL LAW.

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## CHARGING ORDER.

*See* EXPENSES: LAW AGENT.

# CHARITABLE TRUSTS.

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### SECTION 1.—INTRODUCTION.

#### SUBSECTION (1).—*Preliminary.*

462. While the following sections are mainly concerned with trusts instituted for the purpose of administering charitable bequests of a continuing or permanent character, other bodies of a charitable character will occasionally have to be noticed, and cases dealing with these will be found throughout the article wherever their nature has made it appropriate to include them.

#### SUBSECTION (2).—*Definition.*

463. The legal meaning of the words “charity” or “charitable purposes” so far as revenue cases are concerned may be regarded as settled. In the case of *Pemsel*,<sup>1</sup> Lord Macnaghten laid it down that “Charity in its legal sense comprises four divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law because incidentally they benefit the rich as well as the poor, as indeed every charity must do either directly or indirectly.” With regard to cases

<sup>1</sup> *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] A.C. 531 at p. 583.

other than revenue cases, while the matter has not been stated so definitively, it is clear that the Courts will not now restrict the meaning within such narrow limits as was done in the case of *Baird's Trs.*,<sup>1</sup> where "charity" was held to mean the relief of poverty and nothing more. This broadening of view is manifested in the opinion of Lord Davey in a comparatively recent case in the House of Lords. "There is no doubt that the English law has attached a wide and somewhat artificial meaning to the words 'charity' and 'charitable' derived, it is said, from the enumeration of objects in the well-known Act of Elizabeth,<sup>2</sup> but probably accepted by lawyers before that statute. In the law of Scotland there is no such technical meaning attached to the words. In the course of the argument there was some discussion as to the meaning attached by Scottish judges to the words 'charitable purposes.' I think that these words include a wider range of objects than such as are of a purely eleemosynary character, and I find authority for so saying in the opinion of Lord Watson in the *Pemsel* case."<sup>3</sup>

464. A direction by a testator to use the income of his heritable estate in erecting (1) statues of himself and other members of his family, and (2) artistic towers, on his estates, declaring that his wish was to encourage young and rising artists, and that for that purpose prize were to be given for the best plans of the proposed statues and towers, was held not to be an educational or charitable bequest.<sup>4</sup> The opinion has been expressed that a direction by a testator to his trustees to make such special payments as they might think proper from time to time out of the residue of his estate "to such of his children or children's children" as they might think most deserving, with special instructions to relieve any of them who might be in want, provided always they had not brought themselves into such circumstances by their own misconduct, constituted a charitable bequest.<sup>5</sup>

#### SUBSECTION (3).—*Peculiarities of Charitable Trusts.*

465. In general the principles applicable to trusts for charitable purposes are the same as those applicable to other trusts, and these will be found more fully treated under the title TRUST. There are, however, some important particulars in which charitable trusts differ from other trusts. Some of these may be stated as follows:—

466. As a general rule, though not invariably,<sup>6</sup> charitable trusts are of a permanent character, whereas trusts for other purposes are as a rule temporary in character.

<sup>1</sup> *Baird's Trs. v. Lord Advocate*, 1888, 15 R. 682, per the Lord President at p. 688.

<sup>2</sup> 43 Eliz. c. 2, 1601.

<sup>3</sup> *Blair v. Duncan*, 1901, 4 F. (H.L.) 1 at p. 3.

<sup>4</sup> *McCaig v. University of Glasgow*, 1907 S.C. 231.

<sup>5</sup> *Mitchell's Trs. v. Fraser*, 1915 S.C. 350.

<sup>6</sup> *Scottish Woollen Technical College v. Commissioners of Inland Revenue*, 1926, S.C. 934; *Commissioners of Inland Revenue v. Glasgow Musical Festival Association*, 1926, S.C. 920.



467. The deed setting up or purporting to set up a trust for charitable purposes is always construed with benigance towards the charitable purposes. The Court will not allow a bequest for charitable purposes to lapse because of the omission of the testator to appoint trustees or to supply all the machinery to execute the trust.<sup>1</sup> Nor will any slight error or ambiguity in the nomination of trustees be allowed to defeat the intention of the testator provided it is reasonably clear.<sup>2</sup> "There has always been a latitude allowed to charitable bequests, so that when the general intention is indicated, the Court will find the means of carrying the details into operation."<sup>3</sup>

468. Another point of distinction is to be found in the standard which the Court applies in judging whether trustees have been negligent in the performance of their duties to the extent of rendering them liable for loss arising from such negligence. In the case of trustees in an ordinary trust the standard is that the trustees should shew the care and diligence in the administration of the trust which an ordinary prudent man exercises in the management of his own affairs;<sup>4</sup> but in the case of a charitable trust the trustees will only be held liable for "wilful misapplication."<sup>5</sup> These matters are dealt with more fully below.

## SECTION 2.—DISTINCTION BETWEEN CHARITABLE TRUSTS AND VOLUNTARY ASSOCIATIONS.

469. The distinction which is of importance in this connection is in the powers which the Court has in relation to the administration of the respective bodies. Speaking generally the Court will, in the case of voluntary associations, only interpret the deed or statute which sets out the terms of the contract of association, and will not by direction or order supplement any deficiency in the deed to the effect of empowering the association to carry out its apparent objects. In the case of a charitable trust, on the other hand, the Court will supplement obvious deficiencies in such powers.

470. This is illustrated by the following examples: A voluntary association desired to amalgamate with a larger association having the same aims and objects. There being no provision in the constitution of the former entitling it to dissolve or to amalgamate with another association, a petition was presented craving the Court in the exercise of its *nobile officium* to authorise the petitioning association to pay over the balance of its funds to the larger association and to dissolve.

<sup>1</sup> *Presbytery of Deer v. Bruce*, 1865, 3 M. 402; 1867, 5 M. (H.L.) 20; *Murray and Another (Gill's Exrs.)*, 1891, 29 S.L.R. 173.

<sup>2</sup> *Margaret and Jane Murdoch v. Magistrates and Ministers of Glasgow*, 1827, 6 S. 186; *Governors of Gordon's Hospital v. Ministers of Aberdeen*, 1831, 9 S. 909; *Synod of Aberdeen v. Milne's Trs.*, 1847, 9 D. 745; *Trs. of Trinity Chapel*, 1893, 1 S.L.T. 87.

<sup>3</sup> *Magistrates of Dundee v. Morris*, 1858, 3 Macq. 134 at p. 166.

<sup>4</sup> *Knox v. Mackinnon*, 1888, 15 R. (H.L.) 83, per Lord Watson at p. 87.

<sup>5</sup> See Lord Watson in *Andrews, etc. v. Ewart's Trs.*, 1886, 13 R. (H.L.) 69 at p. 73.

The Court held that it had no power to deal with the matter, the Lord President in the course of his opinion remarking that if they were to grant the authority asked by the petitioners they should be laying it down that their authority was necessary whenever one voluntary association desired to amalgamate with another in order to forward the common purposes of both.<sup>1</sup> In an action of declarator, raised by the sole surviving member against the judicial factor of a society consisting of an amalgamation of two societies formed for the purpose of relieving widows and children of shipmasters and seamen of a particular town, to have it declared that the society should be dissolved and the funds distributed among the sole surviving member and six annuitants, it was held that the society was a friendly society and that the funds could not be distributed in the manner sought, nor would the Court give directions as to what should be done in the circumstances.<sup>2</sup> In a similar case where the last surviving member of a society presented a petition craving the Court to settle a scheme for the administration of its funds, the Court, giving effect to an argument advanced by the Lord Advocate, held that the society was not a charity but a friendly society and dismissed the petition as incompetent.<sup>3</sup> But in a case where funds had been subscribed to relieve the families and dependents of the men lost in the wreck of a ship, and the committee held the funds "with full powers to administer them according to their own discretion, and, in the event of a surplus, to apply them to any similar object," it was held that the fund was the subject of a charitable trust and that the Court had jurisdiction to entertain a petition for the settlement of a scheme for the administration of the surplus funds.<sup>4</sup>

### SECTION 3.—CONSTRUCTION OF THE TRUST DEED.

#### SUBSECTION (1).—*Extent of the Gift.*

471. Questions occasionally arise as to the extent of the gift made for charitable purposes. This is always a question of construction depending upon the terms of the settlement, so that no rules apart from the well-known canons of construction can be referred to or illustrated by decision. Some of the decisions are, however, instructive as shewing the view the Court took of the terms of certain wills under construction.

472. A testator left a specific legacy of £10,000 Scots to a Town Council to be invested by them in heritable security for the benefit of bursars at the Grammar School and the College of the town in all time coming, and directed sums amounting to £1000 Scots to be paid yearly out of the income to the bursars. In course of time the income exceeding £1000 Scots it was held that the right of the bursars was not limited

<sup>1</sup> *Edinburgh Young Women's Christian Institute and Others*, 1893, 20 R. 894.

<sup>2</sup> *Mitchell v. Burness*, 1878, 5 R. 954.

<sup>3</sup> *Smith v. Lord Advocate*, 1899, 1 F. 741.

<sup>4</sup> *Gibson*, 1900, 2 F. 1195.

to that amount but extended to the whole income from the sum invested.<sup>1</sup> Where part of the endowments held by trustees acting under a scheme set up by virtue of the Educational Endowments Act, 1882, was held under a will which provided that the governing body "may expend £150 of the annual sum to be spent" for behoof of the children of poor Highlanders, it was held that the provision was not compulsory on the governing body but optional only.<sup>2</sup>

473. A testator directed his trustees, on the death of his widow, to divide the income of his estate annually among nine named institutions in equal shares. These bodies claimed the fee of the estate; the heirs *ab intestato* maintained that they were only entitled to the liferent, averring that the institutions were of an ephemeral character, and that on the disappearance of all or any of them they as heirs would be entitled to the fee of such portions as effeired to each defunct institution. The Lord Ordinary, refraining from deciding whether there was a dedication of the sum in perpetuity, held that the institutions were entitled only to payment of income.<sup>3</sup> A testator provided an annuity for his wife, and directed that the residue of his estate should after her death be applied, *inter alia*, to four schemes of the Free Church of Scotland to be selected by his trustees. The income from the residue exceeded the sum required for the widow's annuity. She survived the testator for more than twenty-one years, and the accumulations were struck at by the Thellusson Act. In an action of multiplepounding it was held that the four schemes could not be selected until the widow's death; that until her death there could be no residuary legatee; and that the surplus income in question accordingly fell to the testator's heirs *ab intestato*.<sup>4</sup>

#### SUBSECTION (2).—*Objects of the Charity.*

474. It is the duty of the trustees to make up their minds as to what are the objects of the charity, but in cases of difficulty they are entitled to apply to the Court for directions. The principles upon which they are permitted to do so were stated by Lord McLaren thus: "It will not be supposed that in taking this course the Court is giving any encouragement to the notion that trustees who are empowered to apply money to charities or purposes of benevolence are to throw the administration of their trust upon the Court. But where a difference of opinion in matters material exists between the trustees and persons who would have a recognised title to appear and contest the administration, such as the chief local authority of the district in which the charity is to be founded, where such a difference of opinion exists, it would seem that

<sup>1</sup> *University of Aberdeen v. Irvine*, 1868, 6 M. (H.L.) 29.

<sup>2</sup> *Glasgow General Educational Endowments Board v. Minister and Managers of St Columba Gaelic Church*, 1886, 23 S.L.R. 765.

<sup>3</sup> *Crawford's Trs. v. The Working Boys' Home and Others* (O.H.), 1901, 8 S.L.T. 371.

<sup>4</sup> *Elder's Trs. v. Treasurer of the Free Church of Scotland*, 1892, 20 R. 2.



trustees are entitled for their exoneration to obtain a judicial interpretation of the trust either under a declarator or under a petition to approve of a scheme.”<sup>1</sup>

475. The following cases illustrate the rule so stated. In a case where a testator directed a share of the rents of his estates to be paid to the Ragged Schools in D., a claim on behalf of a training-ship moored beyond the boundaries of the parish and burgh of D., but within the boundaries of the harbour, was sustained.<sup>2</sup> A testator directed his trustees to employ the residue of his estate in founding and endowing a hospital “for the aliment, clothing, and education of poor children for ever,” and he empowered them to alter the rules for the management of the institution, “they always keeping in view the original intention of said charitable institution.” After the lapse of many years, during which conditions had greatly altered, the trustees proposed certain drastic changes in the rules of the institution. In an action by certain persons who alleged that the trustees were acting contrary to the will of the founder, it was held that the proposed changes were within the power of the trustees if the bursaries were confined to free scholars and the paying pupils paid the whole expense which their education cost the charity.<sup>3</sup>

476. The effect of the amalgamation of churches upon charitable bequests to one or other or all of the amalgamating bodies has been the subject of decision. Certain shares in the income of a sum invested were bequeathed for behoof of the ministers of Original Secession Churches at K., L., and B. The church at K. having amalgamated with the U.F. Church, it was held that the share of income which its minister had enjoyed fell to be divided between the ministers of the Original Secession Churches at L. and B.<sup>4</sup> In 1900 the United Free Church was formed by the Union of the United Presbyterian Church with a majority of the Free Church. It was held that the bursaries payable from an endowment effected by a bequest of residue of an estate for the benefit of students studying for the ministry of the United Presbyterian Church fell to be paid to students studying for the ministry of the United Free Church.<sup>5</sup> It was also held that the inhabitants of a *quoad sacra* parish, disjoined from the parish *quoad civilia* subsequent to the constitution of a trust fund held by the Kirk Session of the latter for the education within their parish of the children of parishioners and others, had not ceased to be beneficiaries under the trust.<sup>6</sup>

477. Bequests for “the poor or needful” of a district,<sup>7</sup> for “the poor

<sup>1</sup> *Gerard's Trs. v. Magistrates of Monifieth*, 1901, 3 F. 800.

<sup>2</sup> *Bogie's Trs. v. Swanston*, 1878, 5 R. 634.

<sup>3</sup> *Allan v. Stiell's Trs.*, 1876, 4 R. 162; see also *Playfair v. Kelso Ragged Industrial School*, 1905, 7 F. 751.

<sup>4</sup> *Lyons' Trs. v. Aitken*, 1904, 6 F. 608.

<sup>5</sup> *Mailler's Trs. v. Allan*, 1904, 7 F. 326; cf. *The Ferguson Bequest Fund*, 1899, 1 F. 1224.

<sup>6</sup> *St Nicholas Kirk Session v. St George's-in-the-West Kirk Session*, 1915 S.C. 834.

<sup>7</sup> *Palerson's Trs. v. Christie*, 1899, 1 F. 508.



of the parish,"<sup>1</sup> for "the poor in the parish,"<sup>2</sup> were held not to be limited to the poor in receipt of parochial relief. But in another case it was held that a bequest "toward the relief of the poor of the parish" was not a bequest in favour of the occasional poor but of the poor having a statutory claim for relief.<sup>3</sup>

478. After the passing of the Universities (Scotland) Act, 1889, a bequest made in 1880 for the establishment of bursaries for "students" at the University of St Andrews, which before the passing of the Act was open to male students only, was upon petition held to extend to female as well as male students.<sup>4</sup>

SUBSECTION (3).—*Whether the Bequest void through vagueness and uncertainty.*

479. The question whether a bequest is or is not void owing to the vagueness and uncertainty of the terms in which it is expressed now falls to be considered. While it is impossible to define "vagueness" or "uncertainty" in general terms and apart from the special circumstances in relation to which they arise, nevertheless the decisions illustrate the considerations which require to be kept in view in determining whether or not a bequest is void from these causes. With regard to the construction put upon the words "charity" or "charitable" it may now be taken as definitely settled that it is wider<sup>5</sup> than that given to it in the case of *Baird's Trs.*,<sup>6</sup> where the words were held to mean "the relief of poverty" and nothing more. On the other hand, the Scottish Courts will not give the wide interpretation to the term which the English Courts have given to it and which is founded upon a statute passed in the reign of Elizabeth.<sup>7</sup>

480. While the law will not make nor allow anyone to make a will for a testator,<sup>8</sup> it has been settled by a series of decisions, beginning with a case decided in 1828,<sup>9</sup> that in the case of a charitable bequest a testator may confer upon his testamentary trustees a power of selection of the objects of his bounty. Lord Lyndhurst in that case<sup>9</sup> answering the question, "Whether it is competent for the disposer, by a deed of this description, to point out particular classes of persons and objects which are intended to be objects of his favour, and then to leave it to an

<sup>1</sup> *Parish Council of Kinloss v. Morgan*, 1908 S.C. 192.

<sup>2</sup> *Liddle and Others v. Kirk Session of Bathgate*, 1854, 16 D. 1075; see also *Hardie v. Kirk Session of Linlithgow*, 1855, 18 D. 37; and opinions of Lord Cranworth and Lord Colonsay in *Bruce v. Presbytery of Deer*, 1867, 5 M. (H.L.) 20 at p. 22.

<sup>3</sup> *Flockhart v. Kirk Session of Aberdour*, 1869, 8 M. 176.

<sup>4</sup> *Blyth Scholarship Fund Trs. v. University Court of St Andrews*, 1905, 7 F. 855.

<sup>5</sup> *Blair v. Duncan*, 1901, 4 F. (H.L.) 1 at p. 3; see also opinion of Lord Kinnear in *Allan v. Allan's Exr.*, 1908 S.C. 807 at p. 813; and of Lord Skerrington in *Anderson's Trs. v. Scott*, 1914 S.C. 942 at p. 954.

<sup>6</sup> *Baird's Trs. v. Lord Advocate*, 1888, 15 R. 682, per the Lord President at p. 688.

<sup>7</sup> *Blair v. Duncan*, 1901, 4 F. (H.L.) 1, per Lord Davey at p. 3.

<sup>8</sup> Lord Chancellor in *Grimond or Macintyre v. Grimond's Trs.*, 1905, 7 F. (H.L.) 90 at p. 91.

<sup>9</sup> *Crichton v. Grierson*, 1828, 3 W. and S. 329.

individual, or body of individuals, after his death, to select out of those classes the particular individuals or the particular objects to whom the bounty of the testator shall be applied," said, "I apprehend that, according to the authorities in the law of Scotland, it is quite clear a party has this power." This *dictum* has been quoted with approval in subsequent decisions<sup>1</sup> and the rule has been frequently applied.<sup>2</sup> The power of selection within the defined limits may be given by the testator by plain implication as well as by express words,<sup>3</sup> but, in the absence of any indication to the contrary, the power to select the objects within the defined limits is personal to the trustee upon whom it is conferred.<sup>4</sup>

481. The Court, however, will not allow unlimited range of choice to the party named by the testator; and in a case where a testatrix directed that the residue of her estate should be applied "for such charitable or public purposes as my trustee thinks proper," it was held that the direction was void from uncertainty, in respect that the words "charitable or public" were used disjunctively and that a bequest for such "public" purposes as a trustee might select was void, as it did not designate a particular class of objects from which the trustee might make a selection: the word "public" being regarded as of such wide significance as to include objects which could in no sense be described as charitable.<sup>5</sup> The words "public purposes," even when qualified by a local limitation, have been held to be too indefinite to receive effect.<sup>6</sup> The same result was arrived at where a testator directed his trustees to apply the residue of his estate "for behoof of such charitable or other deserving institutions in connection with the city of Glasgow as my trustees shall think fit,"<sup>7</sup> and also where the bequest was "to or among such charitable or religious institutions and societies as my trustees may select."<sup>8</sup>

482. It should, however, be noted that a different conclusion may be reached when "or" joins words each of which is capable of having attached to it a meaning which is charitable in the legal sense. A bequest of residue "amongst such societies or institutions of a benevolent or charitable nature" as (my trustees) shall in their own dis-

<sup>1</sup> See opinion of Lord Dundas in *Dick's Trs. v. Dick*, 1907 S.C. 953 at p. 957, *affd.* 1908 S.C. (H.L.) 27; speeches of Lord Davey and Lord Robertson in *Blair v. Duncan*, 1901, 4 F. (H.L.) 1 at pp. 4 and 5.

<sup>2</sup> *Chalmers' Trs. v. Turriff School Board*, 1917 S.C. 676; *Cameron's Trs. v. Mackenzie*, 1915 S.C. 313; *M'Phee's Trs. v. M'Phee*, 1912 S.C. 75; *Allan's Exr. v. Allan*, 1908 S.C. 807; *Cleland's Trs. v. Cleland*, 1907 S.C. 591.

<sup>3</sup> *Wordie's Trs. v. Wordie*, 1916 S.C. (H.L.) 126, see Lord Kinnear at p. 128; *Dundas v. Dundas*, 1837, 15 S. 427.

<sup>4</sup> *Robbie's Judicial Factor v. Macrae*, 1893, 20 R. 358; *Landale's Tr. v. Nicol* (O.H.), 1918, 2 S.L.T. 10; *Laurie v. Brown* (O.H.), 1911, 1 S.L.T. 84; *Goudie (Bruce's Factor) v. Forbes and Others*, 1904, 12 S.L.T. 377; cf. *Woodward's Judicial Factor v. Woodward's Exrs.*, 1926 S.C. 534.

<sup>5</sup> *Blair v. Duncan*, 1901, 4 F. (H.L.) 1.

<sup>6</sup> *Turnbull's Trs. v. Lord Advocate*, 1918 S.C. (H.L.) 88.

<sup>7</sup> *Campbell's Trs. v. Campbell*, 1921 S.C. (H.L.) 12; see also *Symmers v. Symmers*, 1918 S.C. 337.

<sup>8</sup> *Grimond or Macintyre v. Grimond's Trs.*, 1905, 7 F. (H.L.) 90.

cretion think proper was held not void: the words "benevolent or charitable" being held to be merely an amplified or redundant method of expressing the concept "charitable."<sup>1</sup> Similarly a direction to trustees to divide residue "among such charities or benevolent or beneficent institutions" as they in their sole discretion should think proper was upheld.<sup>2</sup> Also a bequest to "charitable or philanthropic institutions" was sustained as a bequest in favour of charitable institutions.<sup>3</sup> And a bequest to "religious or charitable institutions one or more conducted according to Protestant principles" was held not void from uncertainty.<sup>4</sup>

**483.** It is also important to observe the interpretation that has been given where the word "and" couples "charitable" with some other word descriptive of a class of objects intended by the testator to be recipients of his bounty. A bequest to "such useful, benevolent, and charitable institutions" as the trustees in their discretion might think proper was sustained.<sup>5</sup> In a case where the bequest was of residue among "such charitable and benevolent institutions in Glasgow and Paisley" as in the discretion of the trustees might seem best, it was held that the testator intended that the favoured institutions should be both charitable and benevolent, and the bequest was held not void from uncertainty.<sup>6</sup> The same result was arrived at where the bequest was to "such of the other benevolent, charitable, and religious institutions in Glasgow and Greenock as (the trustees) in their sole discretion may think proper."<sup>7</sup> It should be noted that this case was distinguished from an earlier one, in which the decision was the other way, where the words under construction were a direction to a trustee to divide residue "amongst such educational, charitable, and religious purposes within the city of Aberdeen as he shall select to be the recipients thereof."<sup>8</sup> The distinction taken was that in *Edgar's* case the phrase used was "religious institutions," whereas in *M'Conochie's Exrs.* "religious purposes" were the words under construction. In the former case Lord Salvesen remarked that "the phrase religious purposes in a given area leaves far more latitude to the trustees than the words which are used here, 'religious institutions.'" The above observation of his Lordship is in agreement with the view of the Lord Justice-Clerk in the latter case of *M'Conochie's Exrs.*, where he observed: "It is a bequest giving the trustee a right to give money to certain 'purposes' named. That of course is much more vague than a bequest giving money to certain 'institutions' of a particular character named."

**484.** The limitation of the bequest to a certain geographical area,

<sup>1</sup> *Hay's Trs. v. Baillie*, 1908 S.C. 1224.      <sup>2</sup> *Paterson's Trs. v. Paterson*, 1909 S.C. 485.

<sup>3</sup> *Mackinnon's Trs. v. Mackinnon*, 1909 S.C. 1041.

<sup>4</sup> *Bannerman's Trs. v. Bannerman*, 1915 S.C. 398.

<sup>5</sup> *Cobb v. Cobb's Trs.*, 1894, 21 R. 638.

<sup>6</sup> *Caldwell's Trs. v. Caldwell*, 1921 S.C. (H.L.) 82.

<sup>7</sup> *Edgar's Trs. v. Cassells*, 1922 S.C. 395.

<sup>8</sup> *M'Conochie's Trs. v. M'Conochie*, 1909 S.C. 1046.



while no doubt helping towards its validity, is not regarded as anything more than an element to be taken into consideration along with the other conditions of the gift. This matter has been referred to in several recent cases.<sup>1</sup>

485. Uncertainty as to the amount of annual income to be devoted to charitable purposes—there being no uncertainty in regard to the purposes or objects of the testator's bounty—will not render a bequest void.<sup>2</sup>

486. The following cases may be noted as further examples of bequests for charitable purposes which were sustained though attacked on the ground of uncertainty: a bequest "for the advancement and diffusion of the science of phrenology and the practical application thereof";<sup>3</sup> a bequest of residue to be employed "in instituting and carrying on a scheme for the relief of indigent bachelors and widowers, of whatever religious denomination or belief they may be, who have shewn practical sympathy, either as amateurs or professionals, in the pursuits of science in any of its branches, whose lives have been characterised by sobriety, morality, and industry, and who are not less than fifty-five years of age, or of aiding any scheme which now exists or may be instituted by others for that purpose."<sup>4</sup> Power was given by a testator to trustees to distribute residue "amongst such charitable institutions, persons, or objects" as they might think desirable; the bequest was sustained—"charitable persons" being construed to mean persons in need of charity.<sup>5</sup>

487. Where a testator bequeathed the residue of his property "for the benefit of foreign missions in India, China, Africa, and South America, or any other foreign field suitable," and appointed an executor, the bequest was held valid, the view taken by the Court being that the executor had an implied power of selection from among the objects mentioned by the testator.<sup>6</sup> A testator provided that his trustees were to pay out of the income of his estate "the salaries of two native missionaries chosen of them for preaching the Gospel of Jesus Christ my Lord among the heathen," and that on the winding up of his estate they were to make provision "for these salaries to be continued to the societies they represent." He made further reference to these bequests in later parts of his will but did not mention the amount of the salaries.<sup>7</sup> In delivering judgment in this case Lord Dundas observed: <sup>8</sup> "I think this case stands in marked contrast to that of *Grimond*.<sup>9</sup> As the learned judges in *Allan's*<sup>10</sup> case pointed out, though a bequest for religious pur-

<sup>1</sup> *Edgar's Trs. v. Cassells*, 1922 S.C. 395; *Turnbull's Trs. v. Lord Advocate*, 1917 S.C. 591; *M'Conochie's Trs. v. M'Conochie*, 1909 S.C. 1046; *Shaw's Trs. v. Esson's Trs.*, 1905, 8 F. 52.

<sup>2</sup> *Macduff v. Spence's Trs.*, 1909 S.C. 178.    <sup>3</sup> *M'Lean v. Henderson's Trs.*, 1880, 7 R. 661.

<sup>4</sup> *Weir v. Crum Brown*, 1908 S.C. (H.L.) 3.

<sup>5</sup> *Cameron's Trs. v. Mackenzie*, 1915 S.C. 313.    <sup>6</sup> *Allan's Exr. v. Allan*, 1908 S.C. 807.

<sup>7</sup> *Renouf's Trs. v. Haining*, 1919 S.C. 497.    <sup>8</sup> *Ibid.* at p. 506.

<sup>9</sup> *Grimond or Macintyre v. Grimond's Trs.*, 1905, 7 F. (H.L.) 90.

<sup>10</sup> *Allan's Exr. v. Allan*, 1908 S.C. 807.



poses in general is too vague to be valid, it does not follow that a will for a special purpose is the less capable of being sustained because that special purpose falls within the general description of religious purposes." A bequest of residue in favour of "poor of this presbytery to be divided—I mean the interest—by the Sessions of the several churches, but to be paid to all Christians except Roman Catholics," was sustained.<sup>1</sup>

488. In addition to the cases already noticed in which bequests were held to be void on the ground of uncertainty, the following may be noted: a bequest under which a testator directed his trustees "to apply the whole residue of my means and estate for the purchasing of premises in the city of Edinburgh, to be used as a shop in which one of the objects is the sale of books dealing with the subject of free thought";<sup>2</sup> a bequest "for religious or charitable purposes in connection with R. as to my trustees may seem best";<sup>3</sup> a bequest to "charitable or other institutions or societies in such shares and proportions as my trustees may think proper";<sup>4</sup> a bequest to "charities in Glasgow, £1000, Do. Abdn., £1000";<sup>5</sup> and a bequest to "religious, charitable, or educational institutions in Edinburgh, Glasgow, and Ayrshire as they may deem to be most deserving of support, or in assisting deserving individuals of good character in such way as my trustees may think best."<sup>6</sup>

#### SECTION 4.—POWERS OF TRUSTEES.

##### SUBSECTION (1).—Source of Powers.

489. The powers of trustees are based upon (1) the deed constituting the trust, (2) statute, and (3) common law. The powers given in the trust deed may be of any kind provided they are not for an illegal purpose or contrary to public policy. The powers given by statute are now very ample, and will be found in the Trusts (Scotland) Act, 1921,<sup>7</sup> particularly ss. 4 and 5. In s. 4 the powers which trustees have, without the necessity of application to the Court, provided they are not at variance with the purposes of the trust, are detailed. Sec. 5 makes it competent for the Court to grant authority to the trustees, on petition, to exercise any of the powers set out in s. 4, even though these may be at variance with the purposes of the trust, on being satisfied that such powers are in the circumstances expedient for the execution of the trust. If neither the powers conferred in the deed nor the powers given by statute suffice to enable the trustees to carry out some purpose necessary and expedient for the execution of the trust, resort can be had to the Court to grant the necessary power under its *nobile officium*.

<sup>1</sup> *Bruce v. Presbytery of Deer*, 1867, 5 M. (H.L.) 20.

<sup>2</sup> *Hardie v. Morison* (O.H.), 1899, 7 S.L.T. 42.

<sup>3</sup> *M'Grouther's Trs. v. Lord Advocate* (O.H.), 1907, 15 S.L.T. 652.

<sup>4</sup> *Jaffrey's Trs. v. Lord Advocate* (O.H.), 1903, 11 S.L.T. 119.

<sup>5</sup> *Low's Exrs. and Others*, 1873, 11 M. 744.

<sup>6</sup> *Brown's Trs. v. M'Intosh and Others* (O.H.), 1905, 13 S.L.T. 72.

<sup>7</sup> 11 & 12 Vict. c. 58.

SUBSECTION (2).—*Control by the Court.*

490. The Court will not as a rule interfere with trustees in the exercise of their powers in the administration of a trust; but in certain circumstances this has been done.<sup>1</sup> Where the residue of an estate was left to be applied "towards the maintenance and promotion of religious ordinances and education and missionary operations" in a district, "and that by means of payments for the erection and support of churches and schools belonging and in connection with" certain religious bodies, it being declared that "the application and appropriation of the trust funds shall be entirely at the option and discretion of the quorum of my said trustees as to the proportion thereof to be applied to the said several objects," it was held that the discretion given to the trustees did not entitle them to withhold all payments from any of the three trust purposes.<sup>2</sup>

A petitioner made allegations of very great irregularities in the administration of a charitable trust being administered by testamentary trustees. The Lord President observing that the allegations "were practically admitted," the Court appointed a judicial factor *ad interim* to investigate and report.<sup>3</sup>

Reference should be made to the provisions relating to the funds of charities in the Education Acts, the Poor Law (Scotland) Act, 1845, and the Local Government (Scotland) Act, 1894; and also to the sections below dealing with *cy près*.

SUBSECTION (3).—*Special Powers.*

491. The terms of the bequest determine whether the trustees may<sup>4</sup> or may not<sup>5</sup> delegate their powers or any part of them. Trustees of a charitable trust were forbidden by the trust deed to sell or alienate heritage belonging to the trust. In a petition for power to feu it was held that feuing being an act of administration was not an alienation of the lands and the petition was refused as unnecessary.<sup>6</sup>

An application by trustees for an audit of their accounts in a trust where the truster had directed that the trustees were to apply annually to the Court of Session for the purpose of having their accounts remitted to and audited by an experienced accountant in Edinburgh whose account when approved by the Court should be sufficient exoneration and discharge, was refused as incompetent.<sup>7</sup> Trustees will not be allowed to audit their own accounts.<sup>8</sup> The Court refused to grant the

<sup>1</sup> *Thomson v. Davidson's Trs.*, 1888, 15 R. 719; *Ritchie v. Davidson's Trs.*, 1890, 17 R. 673.

<sup>2</sup> *Ferguson Bequest Fund v. Commissioners on Educational Endowments*, 1887, 14 R. 624.

<sup>3</sup> *Carmonat v. Mitchell's Trs.*, 1883, 10 R. 829.

<sup>4</sup> *Turbyne v. Kirk Session of Leuchars*, 1875, 3 R. 10.

<sup>5</sup> *M'Culloch, etc. v. Kirk Session and Heritors of Dalry*, 1876, 3 R. 1182.

<sup>6</sup> *Jamieson (O.H.)*, 1884, 21 S.L.R. 541.

<sup>7</sup> *Dundas*, 1869, 7 M. 670.

<sup>8</sup> *Mailler's Trs. v. Allan*, 1904, 7 F. 326.

prayer of a petition which involved alienation of part of the capital of a trust in favour of a statutory board which was necessarily external to and independent of the trust.<sup>1</sup>

### SECTION 5.—LIABILITIES OF TRUSTEES.

#### SUBSECTION (1).—*Standard of Care required.*

**492.** Charitable trustees have always been treated with more favour by the Court than other trustees for whom the standard has always been that of the *vir prudens*.<sup>2</sup> The following *dictum* of Lord Chancellor Eldon in an English case<sup>3</sup> has been quoted with approval by Lord Watson in a Scottish appeal in the House of Lords,<sup>4</sup> and expresses concisely and definitely the manner in which the Courts regard the liability of trustees under a charitable trust in cases where it is sought to have them held liable for breach of trust or maladministration. "With respect to the general principle on which the Court deals with trustees of a charity, though it holds a strict hand on them when there is wilful misapplication, it will not press severely on them when it sees nothing but mistake. It often happens from the nature of the instrument creating the trust that there is great difficulty in determining how the funds of a charity ought to be administered. If the administration of the funds, though mistaken, has been honest and unconnected with any corrupt purposes, the Court, while it directs for the future, refuses to visit with punishment what has been done in the past. To act on any other principle would be to deter all prudent persons from becoming trustees on charities."

#### SUBSECTION (2).—*Illustrations.*

**493.** Where a bequest to the provost and magistrates of a burgh and the ministers of two parishes provided for, *inter alia*, payments of a portion of income from residue equally between the two parishes to be expended by the respective ministers of the parishes on benevolent and charitable purposes in connection with them, it was held that the ministers were not bound to account to the trust shewing how the income had been expended by each of them.<sup>5</sup> A school board, having possessed certain heritable subjects on a colourable title and having received and consumed the rents in *bona fide*, were held not bound to account for the rents so consumed to the heir of the testator, who succeeded to the subjects on the failure of the objects for which the bequest was made.<sup>6</sup> Magistrates of a burgh held a fund as trustees of a hospital for the poor and sick prior to 1695, and received a bequest in

<sup>1</sup> *Philp's Trs.*, 1893, 20 R. 900.

<sup>2</sup> Per Lord Watson in *Knox v. Mackinnon*, 1888, 15 R. (H.L.) 83 at p. 87.

<sup>3</sup> *Attorney General v. Corporation of Exeter*, 1826, 2 Russ. 45.

<sup>4</sup> *Andrews, etc. v. Ewart's Trs.*, 1886, 13 R. (H.L.) 69 at p. 73.

<sup>5</sup> *Trs. of the Buchanan Bequest v. Dunnett*, 1895, 22 R. 602.

<sup>6</sup> *Morrison v. School Board of St Andrews*, 1918 S.C. 51.

the shape of bonds for particular charitable purposes in that year. The magistrates having purchased land, and thereafter received payment from the debtors under the bonds, inmixed the money with the hospital funds and invested the whole funds not used to purchase the land in a loan to the burgh, which became bankrupt. In a question raised in 1873 as to the amount of the bequest the magistrates were held not liable to account for inmixing the two funds, there having been a great increase in the funds of the hospital between the date when the bequest was made and the date when the sum in the bonds was paid. The Court held that the bequest funds must be taken to have benefited by the increase in the hospital funds and so must share the loss arising from the bankruptcy of the burgh, there being no suggestion that the magistrates had appropriated the fund to their own uses or to uses other than charitable though not quite in accordance with the terms of the bequest.<sup>1</sup>

#### SECTION 6.—EXEMPTION FROM TAXATION.

494. By reason of the favour extended towards charitable institutions in general they are to a very large extent, if not entirely, exempt from taxation under the Public General Statutes<sup>2</sup> and also from assessment for rates under many local Acts.<sup>3</sup> Where a case is brought into Court the question in this connection has always been, Does the body claiming exemption satisfy the description of a charitable institution given in the Act under construction? So far as revenue cases are concerned the meaning of the word "charity" is now settled, Lord Macnaghten's *dictum* on that matter in the case of *Pemsel*<sup>4</sup> being accepted as authoritative.

495. Applying the law laid down in the case of *Pemsel*,<sup>4</sup> the Court has held that an association formed for the purpose of holding musical festivals and carrying on educational enterprises for the improvement of musical taste "was a body of persons established for charitable purposes only";<sup>5</sup> that a technical college founded for the general advancement of the Scottish woollen industry was a "charity";<sup>6</sup> and that an assembly hall belonging to a church, which was unlet and yielded no rent or profit, was exempt from assessment as being "vested in trustees for charitable purposes."<sup>7</sup>

496. There are several cases in which the question has been considered whether the funds were or were not contributed with a view

<sup>1</sup> *Magistrates of Edinburgh v. M'Laren*, 1881, 8 R. (H.L.) 140.

<sup>2</sup> Income Tax Act, 1918 (8 & 9 Geo. V. c. 40), s. 37; Finance Act, 1921 (11 & 12 Geo. V. c. 32), s. 30; Finance Act, 1922 (12 & 13 Geo. V. c. 17), s. 43; Finance Act, 1924 (14 & 15 Geo. V. c. 21), s. 6.

<sup>3</sup> Burgh Police Act, 1892 (55 & 56 Vict. c. 55), s. 373; Glasgow Police Act, 1866 (29 & 30 Vict. c. 273), s. 39; Edinburgh Municipal and Police Act, 1879 (42 & 43 Vict. c. 132), s. 70.

<sup>4</sup> *Comrs. for Special Purposes of Inland Revenue v. Pemsel*, [1891] A.C. 531 at p. 583.

<sup>5</sup> *Comrs. of Inland Revenue v. Glasgow Musical Festival Association*, 1926 S.C. 920.

<sup>6</sup> *Scottish Woollen Technical College v. Comrs. of Inland Revenue*, 1926 S.C. 934.

<sup>7</sup> *Surveyor of Taxes v. General Trs. of Free Church of Scotland*, 1893, 20 R. 759.



to their application to charity. An institution which was not to any substantial extent maintained by charity was held not to come under the provision of the Taxes Management Act, 1808,<sup>1</sup> which exempted from payment of inhabited house duty "any hospital, charity school, or house provided for the reception or relief of poor persons."<sup>2</sup> An annuity paid to a minister from the Aged and Infirm Ministers' Fund of the Church of Scotland was exempted from tax under s. 2, Schedule E, of the Income Tax Act, 1853,<sup>3</sup> but held liable to assessment under s. 2, Schedule D, of the same Act.<sup>4</sup> Funds belonging to an incorporated body, which were derived from the entry money of members and were solely applicable as pensions to decayed members and widows of members at the absolute discretion of certain office-bearers, were not regarded as funds appropriated "to a charitable purpose" in the sense of the Customs and Inland Revenue Act, 1885,<sup>5</sup> and were held liable to assessment.<sup>6</sup> Under the same section of the same Act it was held that three benevolent and annuity funds, which were kept separate from the general funds of the body and appropriated entirely to benevolent purposes, and were administered by the Grand Lodge of Freemasons in Scotland for the relief of distress among freemasons, their relatives and dependants, and given entirely at the discretion of the committees of the lodge, were appropriated to charitable purposes and were accordingly exempt from corporation duty.<sup>7</sup>

497. The questions arising under local Acts are generally of the same kind. It was held that a charitable hospital in Edinburgh which, in order to extend its usefulness, opened certain additional wards to patients who should pay 3s. per day for board—no other funds being available—did not thereby lose its character as a building "solely occupied for purposes of charity," and that it was accordingly exempt from assessment.<sup>8</sup>

## SECTION 7.—ADMINISTRATION OF THE TRUST.

### SUBSECTION (1).—*Ex-officio Trustees.*

498. Charitable trusts being of a permanent character testators frequently appoint *ex officio* trustees. Where the body, in virtue of which the *ex-officio* trustee holds the position of trustee on a charitable trust, is materially changed or ceases to exist, questions arise as to the right of the *ex-officio* trustee to continue to act as such. Where the chairman of the parochial board of a parish had been appointed an *ex-officio* trustee on a charitable trust, it was held that, after the abolition

<sup>1</sup> 48 Geo. III. c. 55, Case 4.

<sup>2</sup> *Inland Revenue v. Dundee Royal Lunatic Asylum*, 1895, 22 R. 784.

<sup>3</sup> 16 & 17 Vict. c. 34.

<sup>4</sup> *Duncan's Trs. v. Inland Revenue*, 1909 S.C. 1212.

<sup>5</sup> 48 & 49 Vict. c. 51.

<sup>6</sup> *Incorporation of Tailors in Glasgow v. Inland Revenue*, 1887, 14 R. 729.

<sup>7</sup> *Grand Lodge of Freemasons v. Inland Revenue*, 1912 S.C. 1064.

<sup>8</sup> *Chalmers' Hospital v. Mags. of Edinburgh*, 1881, 8 R. 577.

of parochial boards, the chairman of the Parish Council was not entitled to act as a trustee *ex officio*.<sup>1</sup> After the union of the Free Church and the United Presbyterian Church, ministers of certain United Presbyterian Churches who had been appointed trustees *ex officio* upon a charitable trust were held entitled to act as being the ministers of the churches named by the truster.<sup>2</sup> The fact that ministers of a burgh, who were named along with others as trustees for a charity, took no part in the management of the trust for upwards of a century, was held not to bar their successors from exercising the right.<sup>3</sup>

#### SUBSECTION (2).—*Recovery of Estate.*

**499.** Trustees are entitled, and indeed it is their duty, to vindicate their right to any property to which the trust may have a claim. Before any action is brought for this purpose the question always arises as to whether the trustees have a title to sue. Testamentary trustees who held a fund for charitable objects had paid a sum of £150 to an industrial school. The school trustees, having found it impracticable to continue the school, applied to the Court for power to apply their funds to other objects. The trustees who had made payment of the £150 claimed repayment of that sum on the ground that it was proposed to divert the money from the purposes for which the grant had been made. It was held that having made payment of the money they had no further control over it.<sup>4</sup> A party wrote to a charitable society offering to "become personally responsible for fifty life-pensioners of £6 each" on certain conditions. The offer was accepted and the conditions fulfilled. It was held that the donor's representatives were liable to continue the payment of the pensions of pensioners appointed prior to the donor's death.<sup>5</sup>

#### SUBSECTION (3).—*Title to Intervene.*

**500.** The heir-at-law<sup>6</sup> or the executor<sup>7</sup> of the founder of a charity has an interest which entitles him to see that the trust is properly administered. So also any person who has an interest, either existing or contingent, in the proper administration of the trust "has a good title to pursue all actions before the Court necessary for ascertaining and declaring the powers and duties of trustees and enforcing their execution."<sup>8</sup> This title exists in persons who have no actual claim to benefit under the trust, but who might be selected as beneficiaries by the trustees in the

<sup>1</sup> *Parish Council of Kilmarnock v. Ossington's Trs.*, 1896, 23 R. 833.

<sup>2</sup> *Mailler's Trs. v. Allan*, 1904, 7 F. 326.

<sup>3</sup> *Mags. of Edinburgh v. M'Laren*, 1881, 8 R. (H.L.), 140.

<sup>4</sup> *Trs. of Falkirk Certified Industrial School v. Ferguson Bequest Fund*, 1899, 1 F. 1175.

<sup>5</sup> *Morton's Trs. v. The Aged Christian Friendly Society*, 1899, 2 F. 82; cf. *Cambuslang West Church Committee v. Bryce*, 1897, 25 R. 322.

<sup>6</sup> *M'Leish's Trs. v. M'Leish*, 1841, 3 D. 914.

<sup>7</sup> *Campbell and Another v. M'Intyres*, 1824, 3 S. 126.

<sup>8</sup> Per Lord Cunningham in *Ross v. Governors of Heriot's Hospital*, 1843, 5 D. 589 at p. 609.

exercise of their discretion. Thus parishioners who averred that they might be thrown out of employment and thus become "able-bodied poor" were held entitled to sue an action regarding a fund which had been bequeathed "for behoof of the poor of the parish."<sup>1</sup>

#### SUBSECTION (4).—*Conflict of Laws.*

**501.** The administration of a charitable trust is subject to the laws of the country in which the truster has directed it to be administered, and the Court will order payment of the money to the trustee, leaving all questions as to the administration to be decided in accordance with the laws of the domicile of the trust.<sup>2</sup>

#### SECTION 8.—DENUDING.

**502.** It occasionally happens that questions arise as to the disposal of trust funds set free owing to the failure of the trust purposes or for some other reason. Where the conditions attached to a bequest of two sums of money were such that the donees were unable to fulfil them, the sums were held to fall into residue.<sup>3</sup> A similar result was arrived at where the condition of the bequest was that the trustees should retain the management of a school and the school ceased to exist.<sup>4</sup> A bequest of the interest of a sum of money to the incumbent of a church "so long as the congregation worshipping in said church shall not be united to, or in connection with, the Scottish Episcopal Church" was held to have been forfeited when the incumbent accepted the licence of the Scottish Episcopal Bishop.<sup>5</sup> But where an Industrial School had, after the introduction of free education, ceased to exist as a school, but had continued to apply its funds towards providing clothing and books to destitute children to enable them to attend school, it was held that the bequest had not lapsed, the institution not having lost its identity but merely changed its methods.<sup>6</sup>

#### SECTION 9.—*CY PRÈS.*

##### SUBSECTION (1).—*Definition.*

**503.** The doctrine of *cy près*, or approximation, is, strictly speaking, a doctrine of English law. In Scotland, however, the phrase is applied, rather loosely, to the principle on which the Court deals with cases of

<sup>1</sup> *Ross v. Governors of Heriot's Hospital*, 1843, 5 D. 589; *Mags. of Edinburgh v. Professors of the University*, 1851, 13 D. 1187; *Carmon v. Mitchell's Trs.*, 1883, 10 R. 829; *Mackie v. Presbytery of Edinburgh and Others*, 1896, 33 S.L.R. 479; *Liddle v. Kirk Session of Bathgate*, 1854, 16 D. 1075.

<sup>2</sup> *Ferguson v. Marjoribanks*, 1853, 15 D. 637.

<sup>3</sup> *Marquess of Bute's Trs. v. Marquess of Bute*, 1904, 7 F. 49.

<sup>4</sup> *Young's Trs. v. Deacons of the Eight Incorporated Trades of Perth*, 1893, 20 R. 778.

<sup>5</sup> *Bannerman v. Bannerman's Tr.*, 1896, 23 R. 959.

<sup>6</sup> *Playfair v. Kelso Ragged Industrial School*, 1905, 7 F. 751.

bequests for charitable purposes, where, owing to the lapse of time, or change of circumstances, it has become impossible to carry out the main object of the testator by a strict adherence to the directions laid down by him. In such a case the Court, while it will not substitute one charity for another, has "always exercised the power of varying the means of carrying out the charity from time to time, according as by that variation it can secure more effectually the great object of the charity, namely, the benefit of the beneficiary."<sup>1</sup> Not only will the Court vary the means by which a charitable trust is to be carried out, but it will in some cases substitute for an object which has failed another object of a similar nature. These latter cases shew the application of the doctrine of *cy près* in the stricter sense of the phrase.

#### SUBSECTION (2).—*Limitations of Doctrine.*

504. There are, however, certain limitations which the Court places upon the exercise of its *nobile officium* in this matter. In a recent case the Lord President (Clyde) observed: "I think it necessary to say that the principle of approximation applies only to cases in which the object of a charitable foundation can—owing to changed circumstances—no longer be carried into practical effect in the particular form or by the particular means prescribed by the founder. In such cases the Court has power to vary the means, and to substitute for a particular form of charity another form approximating as closely as may be to the old one. But the principle does not apply to cases in which—there being neither failure of object nor obsolescence of method—the changing circumstances of society have made the duties of the trustees and managers of the foundation much more arduous to perform and discouraging in their results."<sup>2</sup>

505. The Court will not sanction the transfer of trust funds, bequeathed for a permanent purpose, to a body as trustees under a proposed scheme unless the body is of a permanent character.<sup>3</sup> If the bequest has been made for a certain definite charitable purpose, and that purpose has failed during the truster's lifetime, the Court will not substitute another.<sup>4</sup> So also where the purpose, being in existence at the testator's death, fails before the date when the fund becomes available.<sup>5</sup> In the latter case, however, even though the specific object intended by the testator as the recipient of his bounty shall have failed, if a general intention to benefit charitable objects can be spelled out of the trust deed, the Court will substitute some object similar in character to that which has failed.<sup>6</sup> In making such a substitution the Court will take care

<sup>1</sup> Lord Westbury in *Clephane v. Mags. of Edinburgh*, 1869, 7 M. (H.L.) 7 at p. 15.

<sup>2</sup> *Glasgow Domestic Training School*, 1923 S.C. 892 at p. 895; see also Lord M'Laren in *Gerrard's Trs. v. Mags. of Monifieth*, 1901, 3 F. 800 at p. 804.

<sup>3</sup> *M'Grouther's Trs.*, 1911 S.C. 315.

<sup>4</sup> *In re Rymer*, *Rymer v. Stanfield*, [1895] 1 Ch. 19.

<sup>5</sup> *Burgess's Trs. v. Crawford*, 1912 S.C. 387.

<sup>6</sup> *Anderson's Trs. v. Scott*, 1914 S.C. 942; *Aberdeen Servants' Benevolent Fund*, 1914 S.C. 8; *Glasgow Domestic Training School*, 1923 S.C. 892.



that the substituted object is not one for which it is lawful to impose rates or to which public money has already been dedicated.<sup>1</sup>

SUBSECTION (3).—*Application to Public Trusts.*

503. Scots law does not limit the application of the principle of *cy près* to charitable trusts. In the case of *Anderson's Trs.*, Lord Skerrington in delivering the opinion of the Court observed: "Assuming, however, that a trust has once been validly constituted in which the public have an interest, there seems to be no reason why we should adopt the English rule that only a charitable trust can be administered *cy près*." <sup>2</sup> Earlier in the same opinion he observes: "I respectfully adopt the following statement of the law of Scotland which was published in the year 1894 as still substantially accurate: 'The term charitable trust is a convenient general name, but it must be kept in view that the law of Scotland (as hitherto understood and administered) recognises no distinction either as to construction or principles of administration between gifts to charitable uses so called, and gifts to purposes which, though not charitable, are lawful and useful. The true distinction is between private trusts and bequests in which only individuals named or designed can claim an interest, and those which are intended for the benefit of a section of the public and which may be enforced by *popularis actio*. A gift to a community of a public park, library, or place of recreation, would not, according to the ordinary use of language, be described as a charity, while a hospital or an asylum would be so described; but the law which governs the trust intended to promote healthy exercise of the mind and body is (in the absence of artificial limiting rules) necessarily the same law which applies to the trust for the restoration of mind or body when injured or diseased.' " <sup>3</sup>

SUBSECTION (4).—*Classes of Application.*

507. The cases which have arisen in this connection may be broadly divided into two classes: (1) Applications to the Court for power to vary the method of applying the means at the disposal of the charity; and (2) applications for authority to extend the benefits of the charity to new classes of persons. They will accordingly be treated under these heads.

(i) *For Power to vary Method of Administration.*

508. The usual procedure in such cases is by petition presented to either Division of the Inner House by the trustees or other persons having title and interest. There have occurred cases, however, in which the House of Lords has made a remit to the Court of Session to settle

<sup>1</sup> *Anderson's Trust*, 1896, 23 R. 592; *Kirk Session of Prestonpans v. School Board of Prestonpans*, 1891, 19 R. 193.

<sup>2</sup> *Anderson's Trs. v. Scott*, 1914 S.C. 942 at p. 956.

<sup>3</sup> *M'Laren, Wills and Succession*, ii. 917.

a scheme for the administration of the funds belonging to the charity where the original method has become impossible.<sup>1</sup>

**509.** The following cases may be noted as examples of authority given to adapt the administration of a charitable trust to altered circumstances: The Court has approved of the transfer of a fund bequeathed to a Scottish society for the purpose of promoting anti-vivisection to another Scottish society whose object was the furtherance of the anti-vivisection movement;<sup>2</sup> and also of the sale and transfer of a working men's institute, kept up by subscription, to the trustees of a similar endowed institute of later origin.<sup>3</sup> Where the purposes of an educational trust had failed, the Court authorised the trustees to apply part of the proceeds of the trust property in paying gratuities to the officials and servants of a school which had been discontinued.<sup>4</sup> In an application for the approval of a scheme for the administration of an educational trust, of which the original purposes had failed, a scheme was sanctioned under which part of the trust was to be applied in paying a retiring allowance to a teacher in a school previously carried on by the trustees, but which it was proposed to discontinue.<sup>5</sup> A scheme was approved which included a provision for the awarding of bursaries in place of payment of apprentice fees;<sup>6</sup> and one was authorised which proposed an alteration in the terms and conditions upon which certain bursaries should be held, and included power to the trustees to alter these conditions from time to time.<sup>7</sup> Where heritable subjects had been disposed for the purpose of founding and maintaining a Roman Catholic School, the trustees were empowered to sell the subjects, which had proved to be unsuitable, and to purchase subjects of a more convenient kind.<sup>8</sup> Trustees were authorised to expend certain trust money on the erection of a nurses' home, in place of a fever convalescent home, for which it had been destined and for which it had become unnecessary.<sup>9</sup> Where a bequest of the income from certain heritable property in favour of the minister for the time being of an Original Secession Church had proved inoperative owing to the dissolution of the congregation, and it was proposed to apply the bequest to two funds of the Original Secession Church with a power of sale of the heritable property, which was prohibited by the testatrix under pain of nullity, the powers asked were granted.<sup>10</sup> Where a hospital belonging to an old charity had been sold to a railway company, the Court held that the intentions of the truster could be better carried out by the institution of a system of outdoor

<sup>1</sup> *Clephane and Others v. Mags. of Edinburgh*, 1864, 2 M. (H.L.) 7; *University of Aberdeen, etc. v. Irvine*, 1868, 6 M. (H.L.) 29.

<sup>2</sup> *Glasgow Society for Prevention of Cruelty to Animals v. National Anti-Vivisection Society*, 1915 S.C. 757.

<sup>3</sup> *Simpson v. Trs. of Moffat Working Men's Institute*, 1892, 19 R. 389.

<sup>4</sup> *Trs. of Falkirk Certified Industrial School v. Ferguson Bequest Fund*, 1899, 1 F. 1175.

<sup>5</sup> *Trs. of Portobello Female School*, 1900, 2 F. 418.

<sup>6</sup> *Burnet's Trs.*, 1876, 4 R. 127.

<sup>7</sup> *Stewart's Trs.*, 1909 S.C. 144.

<sup>8</sup> *Downie and Another*, 1879, 6 R. 1013.

<sup>9</sup> *Glasgow Infirmary*, 1887, 14 R. 680.

<sup>10</sup> *Stranraer Original Secession Congregation*, 1923 S.C. 722.

relief than by the rebuilding of the hospital.<sup>1</sup> Trustees were authorised to sell a hospital which had been founded by a testator who died in 1829 and which was benefiting a different class of persons from that contemplated by the founder, and to apply the income of the trust in future in payments of outdoor relief.<sup>2</sup> The Court authorised, without formally approving, a scheme under which trustees administering a bequest made in 1789 for supplying poor householders in Edinburgh with oatmeal at 10d. per peck (which was approximately half the market price in 1908) were empowered to supply coal, milk, oatcakes, bread, or flour at half market price to the beneficiaries.<sup>3</sup> The trustees of a fund connected with a naval depot averring that the administration of the fund had become unworkable through lack of effective machinery for carrying it on, in respect that owing to the reduction of the depot staff persons eligible to act as administrators were no longer available, were authorised to transfer the fund to a general naval trust having similar objects.<sup>4</sup> An association, which had managed an institution for the education and training of destitute boys in an industrial training-ship, having found that it was no longer possible to carry on the institution usefully, and having realised the assets and wound up its affairs, was authorised to transfer the funds to certain trustees with power to them to assume new trustees on vacancies occurring.<sup>5</sup>

**510.** On the other hand, the Court refused to approve of provisions in a proposed scheme (1) that the trustees should be allowed to audit the trust accounts themselves; (2) that they should be empowered to award bursaries during the whole of a student's curriculum, a condition made by the testator being that no student should hold a bursary longer than one year.<sup>6</sup>

(ii) *For Authority to extend Benefits to New Classes of Persons.*

**511.** Applications for this purpose have been granted in widely differing circumstances, of which the following are examples: The limit of age fixed by the truster to qualify an orphan for admission to an orphanage established by funds left by him was altered from eight to five years.<sup>7</sup> Qualifications necessary to applicants for a prize for medical research were altered so as to enlarge the class from which applicants might compete.<sup>8</sup> The benefit of funds raised in D. in 1873 for the families and dependants of a shipwrecked crew was extended in 1900 to persons belonging to D. who might thereafter suffer loss by shipwreck or other perils of the sea.<sup>9</sup> A wide extension of the class of

<sup>1</sup> *Clephane and Others v. Mags. of Edinburgh*, 1869, 7 M. (H.L.) 7.

<sup>2</sup> *Governors of John Watt's Hospital*, 1893, 20 R. 729.

<sup>3</sup> *Guardian of Thomson's Mortification*, 1908 S.C. 1078.

<sup>4</sup> *Rosyth Canadian Fund Trs.*, 1924 S.C. 352.

<sup>5</sup> *Clyde Industrial Training Ship Association*, 1925 S.C. 676.

<sup>6</sup> *Mailler's Trs. v. Allan*, 1904, 7 F. 326.

<sup>7</sup> *Trs. of Carnegie Park Orphanage*, 1892, 19 R. 605.

<sup>8</sup> *Trs. of the "John Reid Prize"*, 1893, 20 R. 938.

<sup>9</sup> *Gibson*, 1900, 2 F. 1195.

persons designated as beneficiaries of a mortification providing for the maintenance in hospital of "five widows and five maiden daughters of" burgesses in a certain city not under fifty years of age was authorised, but authority to extend the charity to persons not resident in the hospital was refused.<sup>1</sup> In 1903 authority was granted to trustees holding under testamentary writings, dated 1866, funds for bursaries to students, "sons of Protestant parents" at a university, to extend the benefit to female students.<sup>2</sup> Trustees holding a sum of money for the purpose of founding a bursary to be granted by them "to any deserving young man, being a native of D., attending college in the prospect of becoming a minister of the Established Church of Scotland or as a missionary," were, on the failure of applicants having the necessary qualifications, authorised to extend the class to otherwise qualified applicants born in the presbytery of D., or failing them to otherwise qualified applicants without conditions as to nativity.<sup>3</sup>

**512.** On the other hand, the Court refused to extend the benefit of the charity to new classes of persons in the following cases:—

Where a testator had left money to found a bursary for young men, natives of Nairnshire, and the trustees having found difficulty in getting suitable male candidates, petitioned the Court for the approval of a scheme by which the bursary should be thrown open to young women also<sup>4</sup>; where a testator left the residue of his estate for the endowment of bursaries restricted to students born in the counties of Fife and Kinross, and the trustees proposed to award the bursaries to persons born outside of these counties on the failure of candidates born in either of them.<sup>5</sup> Where trustees of a testator who died in 1895 were in possession of funds to found a bursary to be conferred on "one young man of merit, being a native of the parishes of Callander or Trossachs, and to be tenable for three years, to enable such young man to attend the arts classes in any of the Scottish Universities, with the view of taking his degree of Master of Arts," they were in 1910 refused power to extend the benefits of the trust to women students being natives of the parishes favoured.<sup>6</sup>

<sup>1</sup> *Governors of Mitchell's Hospital*, 1902, 4 F. 582.

<sup>2</sup> *Clark Bursary Fund (Mile-end) Trs.*, 1903, 5 F. 433.

<sup>3</sup> *Kirk Session of Dunbar*, 1908 S.C. 852.

<sup>4</sup> *Grigor Medical Bursary Fund Trs.*, 1903, 5 F. 1143.

<sup>5</sup> *Mailler's Trs. v. Allan*, 1904, 7 F. 326.

<sup>6</sup> *Duart Bursary Fund Trs.*, 1911 S.C. 9.



# CHARTER (FEUDAL).

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## PART I.—GENERAL.

513. Although Erskine speaks of a charter as “that writing which contains the grant or transmission of the feudal right to the vassal,”

and divides charters granted by subject-superiors into those with an *a me* and those with a *de me* holding,<sup>1</sup> the term charter is now used to signify the deed by which a new feudal fee is created, the deed disposing the lands contained in it to be held by the grantee *de me*, *i.e.* of the granter, whereas the deed transferring a feudal fee already created is called a disposition. The constitution of the contract of feu is subject to the same strict rules of evidence or solemnity as regulate all contracts for transfer of heritable property according to the law of Scotland. But that is subject to the like exceptions as apply in other cases within the class, *e.g.* a contract was held to have been established by receipts for feu-duty; in that case the first receipt was holograph; it identified the feu; there was possession; and the receipts covered a long period.<sup>2</sup>

## PART II.—CROWN CHARTER.

### SECTION 1.—ORIGINAL CHARTERS.

**514.** Original charters, properly so called, are now seldom granted by the Crown, because most of the lands in the country have already been disposed by charter, or its equivalent. On account of the provision of s. 4 of the Conveyancing Act, 1874,<sup>3</sup> to the effect that it is unnecessary for the renewal of an investiture to obtain from a superior any charter, precept, or other writ by progress, and that it is incompetent for a superior to grant any such writ by progress, it has, since the commencement of that Act, been unnecessary and incompetent for a proprietor of lands held of the Crown to obtain, *e.g.*, a Crown charter or writ of resignation, or a Crown charter or writ of confirmation, for the granting of which writs full provision was made by the Titles to Land Consolidation Act, 1868.<sup>4</sup> It is, however, still competent to obtain from the Crown charters of *novodamus*, charters of *ultimus hæres*, charters of bastardy, charters of mines and minerals under the statute of 5th June 1592 (intituled “An Act for the furthering of the King’s Commodities of Mines and Metals”), charters upon forfeitures for high treason, and precepts and writs of *clare constat*.

### SECTION 2.—CHARTER OF NOVODAMUS.

**515.** Before the abolition of writs by progress by the Conveyancing Act, 1874, a clause of *novodamus* was often inserted in a charter by progress granted by the Crown, with the object of securing the grantee of the charter against the effects of feudal delinquencies incurred by his author or any former vassal in the lands. As already stated, charters of *novodamus* can still be competently obtained from the Crown. When a Crown charter of *novodamus* is desired, the applicant requires to obtain the consent and approbation of the Commissioners of His

<sup>1</sup> Ersk. ii. 3, 19–20.

<sup>2</sup> *Stodart v. Dalzell*, 1876, 4 R. 236.

<sup>3</sup> 37 & 38 Vict. c. 94.

<sup>4</sup> 31 & 32 Vict. c. 101, ss. 80 to 83.

Majesty's Woods, Forests, and Land Revenues, or any one of them, and of the Commissioners of the Board of Trade, and he also requires to produce written evidence of these consents, along with a note, praying for a charter in terms of a draft thereof, prepared by a Writer to the Signet, which note and draft he requires to lodge in the office of the Sheriff of Chancery.<sup>1</sup> After being revised and adjusted, the draft charter is engrossed in Chancery, and thereafter lodged with the King's and Lord Treasurer's Remembrancer, who transmits it for the sign manual of His Majesty, and the signatures of the Commissioners of His Majesty's Treasury, or any two of them, or, in case the charter of *novodamus* be of lands held of the Prince, and if His Royal Highness be of full age, for the consent and approbation of the Prince, signified under his sign manual and the signature of the Commissioners. After the charter of *novodamus* has been so signed, the Great (or Union) Seal may be attached to it at the desire of the grantee, but all Crown writs are now as effectual without the seal as if the same were appended thereto.<sup>2</sup>

### SECTION 3.—CHARTERS OF ULTIMUS HÆRES AND GIFTS IN BASTARDY.

**516.** When the Crown, as *ultimus hæres*, succeeds to land held of the Crown, the *dominium utile* is deemed to be consolidated *ipso jure* with the *dominium directum*; and when the Crown succeeds to lands held of a subject-superior, the Crown becomes proprietor of the *dominium utile*. The practice is for the Crown to make, under certain conditions, a gift of the land to which it so succeeds to the person who has the best claim thereto, and the procedure in the donation is (1) the obtaining of a warrant from the Crown, through Exchequer, for making the gift; (2) the finding of caution by the donee; and (3) the obtaining of a deed of gift. The deed of gift passes the seal, and is signed by the Director of Chancery, and the donee named under it can complete a title by recording it with a warrant of registration in the appropriate register of sasines. What has been said regarding gifts of *ultimus hæres* applies to gifts in bastardy. It is unnecessary to make any remarks on charters of forfeiture, for they are now never used. If the Crown grants a charter of mines and minerals under the Statute 1592, the form is not dissimilar from that used in a grant of mines and minerals by a subject-superior.

### SECTION 4.—WRITS AND PRECEPTS OF CLARE CONSTAT.

**517.** An heir, on the death of his ancestor who held lands of the Crown, can complete his title by a writ or precept of *clare constat*, just as if his ancestor held the lands of a subject-superior; but as Crown

<sup>1</sup> 31 & 32 Vict. c. 101, ss. 64 and 88; 37 & 38 Vict. c. 94, s. 57.

<sup>2</sup> 31 & 32 Vict. c. 101, s. 78.

writs and precepts of *clare constal* are granted only after an heir has expedé a service in his favour, they are, it is believed, never applied for in practice.<sup>1</sup>

### PART III.—FEU-CHARTER BY SUBJECT-SUPERIOR.

#### SECTION 1.—INTRODUCTION.

**518.** Charter and infeftment constitute the relationship of superior and vassal between the granter and the grantee. Before dealing with the feu-charter in its modern form, it is useful to shew how the feudal relationship was formerly constituted.

#### SECTION 2.—CHARTER AND INFESTMENT PRIOR TO THE INFESTMENT ACT, 1845.

##### SUBSECTION (1).—*Proper and Improper Investiture.*

**519.** For the constitution of the relation of superior and vassal no writing was, by our earliest customs, required. A proprietor made manual delivery to the grantee, on the lands and in the presence of his vassals (*pares curiæ*), or at least two of them, of a symbolical portion of a part of his lands as representing the whole of that part, and the grantee took the oath of fidelity. On this being done, the granter and the grantee became respectively superior and vassal. When the granter had no vassals, two or more strangers were called to witness the ceremony of giving possession to the grantee. In course of time, the granter, after possession had been given to the grantee, came to give a declaration of the grant in writing, which was called *breve testatum*, to which the granter and the witnesses appended their seals.<sup>2</sup> Instead of a *breve testatum* sealed by the granter and witnesses, a certificate of a notary public, or of two witnesses from among the granter's vassals, was sometimes given as an attestation of the delivery of possession to the grantee.<sup>3</sup> The form of constituting the feudal relationship above described was called proper investiture, because possession was given by the granter *in propria persona*. The *breve testatum* is the foundation of the modern charter. As it was often inconvenient for the granter to attend personally on the lands, the practice was introduced of executing the *breve testatum* prior to delivery of possession, and directing it to the granter's commissioner or bailie as a warrant to give possession to the grantee. The commissioner or bailie, after giving delivery of the lands to the grantee, either sealed the *breve testatum* in attestation of the delivery, or wrote out and sealed a separate declaration of the fact. On account of delivery having been given,

<sup>1</sup> For procedure in obtaining Crown charters, or writs, or precepts, see 31 & 32 Vict. c. 101, ss. 63 *et seq.*; and on Crown charters and writs, see Juridical Styles, 6th ed., i. 134 *et seq.* See COMPLETION OF TITLE.

<sup>2</sup> Ersk. ii. 3, 17.

<sup>3</sup> Menzies, 529; Bell, Conv. i. 577.



not by the granter *in propria persona*, but by his commissioner or bailie, this form of creating the feudal relationship was called improper investiture. The declaration given by the bailie in improper investiture is the foundation of the instrument of sasine.<sup>1</sup>

#### SUBSECTION (2).—*Charter.*

520. Both proper investiture and improper investiture were superseded, early in the fifteenth century, by the introduction of the practice of proprietors granting formal charters to their grantees. At first a separate precept authorising infeftment accompanied the charter; and the precept continued for fully two centuries to be a writ separate from the charter. But by 1672, c. 7, it was enacted that all precepts on charters by the Crown should be engrossed in the charters towards the end; and this provision soon gave rise to the custom of embodying precepts in charters by subject-superiors. After stating the way in which the precept became part of the charter, Erskine adds: "Now, therefore, all charters, without exception, conclude with a precept of seisin, which may be defined a command by the superior, who grants the charter, to his bailie, to give seisin or possession of the subject disposed to the vassal or his attorney by the delivery of the proper symbols."<sup>2</sup>

521. The steps necessary for constituting the feudal relationship, for many years prior to the commencement of the Infeftment Act, 1845, were (a) the granting of a charter; (b) symbolical delivery by the appropriate symbols on the ground of the lands; and (c) the expeding by a notary, and the recording within sixty days of its date, of an instrument of sasine in favour of the grantee, in the appropriate register of sasines. No useful purpose would now be served by inserting here a form of pre-1845 charter, but it may be helpful to print the form of the clause in the charter which was known as the precept of sasine. The pre-1845 form of that clause was :

Moreover, I hereby desire and require you , and each of you, my bailies in that part hereby specially constituted, that on sight hereof ye pass to the ground of the said lands and others, and there give and deliver to the said B. or his foresaids heritable estate and sasine, real, actual, and corporal possession, of all and whole the lands, teinds, and others particularly above specified, with the parts and pertinents thereto belonging, lying and described as aforesaid, and here held as repeated *brevitatis causa*, to be holden in manner foresaid, and for payment of the feu-duties before specified, and that by deliverance to the said B. or his foresaids, or to his or their attorney, in his or their names, bearers hereof, of earth and stone of the ground of the said lands, and an handful of grass and corn for the said teinds, with all other symbols usual and necessary; and this in noways ye leave undone: Which to do I commit to you and each of you, my bailies in that part foresaid, my full power by this my precept of sasine directed to you for that effect.

<sup>1</sup> On proper and improper investiture, see Ersk. ii. 3, 17; Menzies, 528-529; Bell, Com. i. 576-577.

<sup>2</sup> Ersk. ii. 3, 33.

**522.** The precept of sasine was the executive clause of the charter. It had to contain a mandate to give delivery or sasine to the disponee, who required to be identified; and to define in itself, or by reference to other parts of the deed, the lands disposed, which required to be described particularly, or so identified that they could be ascertained,<sup>1</sup> *i.e.*, if the deed was to form a warrant for direct infeftment of the disponee without production to the notary of the disposer's infeftment. But a precept of sasine to give infeftment in lands described in general to belong to the granter of the precept is a sufficient warrant to give infeftment in every property which, by production of the granter's infeftments, is vouched to come under the general description; although it is necessary in such a case that the granter's infeftment in the particular property should not only be produced to the notary but should also be specified in the grantee's infeftment.<sup>2</sup> The general name of a barony, however, includes all its parts, and a warrant to infeft in the barony or any part of it was found sufficient without extraneous evidence to authorise infeftment in lands described as forming part of the barony.<sup>3</sup> In the case of *Wallace*,<sup>4</sup> when a warrant bore an obligation to infeft in particular lands and all other lands belonging to the disposer and lying within a particular county, and the precept of sasine was in the same terms, the instrument of sasine thereon was held null, in so far as it comprehended the lands other than those particularly mentioned in the deed, because it did not bear, as regards the other lands, that the disposer's infeftment had been produced to the notary.<sup>5</sup>

**523.** Precepts of sasine are classed as follows: (a) general<sup>6</sup> and special;<sup>7</sup> (b) unexhausted and exhausted;<sup>8</sup> and (c) definite and indefinite. A general precept is one authorising infeftment in fee, whereas a special precept authorises infeftment in something short of a fee, *e.g.* in security or in liferent. On the ground that the greater includes the less, a general precept authorises a sasine in security,<sup>9</sup> or in liferent,<sup>10</sup> or in fee under the fetters of an entail.<sup>11</sup> In the case of a disposition to trustees and their assignees, containing a power of sale, an obligation to infeft the trustees and their assignees, and a precept of sasine, it was held that a conveyance of the unexecuted precept to a purchaser, who took infeftment under it, formed a good feudal title.<sup>12</sup> A precept is said to be unexhausted until it is duly executed, and exhausted when it has been duly executed. The due execution of a precept implies

<sup>1</sup> Bell, Prin., s. 876.

<sup>2</sup> *Wallace v. Dalrymple*, 1742, Mor. 6919; *Belches and Murray v. Stewart*, 21st January 1815, F.C.

<sup>3</sup> *Hill v. Duke of Montrose*, 1833, 11 S. 958.

<sup>4</sup> 1742, Mor. 6919.

<sup>5</sup> See also *Duke of Norfolk v. Billers*, 1739, 2 Ross's L.C. 28; *Belches and Murray v. Stewart*, *supra*.

<sup>6</sup> Bell, Prin., s. 876.

<sup>7</sup> *Ibid.*, s. 877.

<sup>8</sup> *Ibid.*, s. 879.

<sup>9</sup> *Mitchell v. Adam*, 1767, Mor. 14335; 2 Ross's L.C. 418; *Bonthrone v. Bonthrone's Tr.*, 1805, Hume, 238; 2 Ross's L.C. 421; *Melvin v. Dakers*, 1843, 5 D. 1217.

<sup>10</sup> *Grahams v. Graham*, 1759, Mor. 6931.

<sup>11</sup> *Livingstone v. Lord Napier*, 1762, Mor. 15418, 15461; *affd.* 1765, 2 Pat. 108.

<sup>12</sup> *Cockburn v. Cameron*, 1836, 14 S. 889.

the due infeftment to the full extent of the precept<sup>1</sup> of the person in whose favour it was conceived, or one in his right as his heir or assignee; and accordingly, if an instrument of sasine was not recorded,<sup>2</sup> or recorded in the wrong register,<sup>3</sup> or if there was a fatal error in the taking of sasine,<sup>4</sup> or in the instrument of sasine itself,<sup>5</sup> or in the recording of the instrument,<sup>6</sup> the precept remained in force, so that a valid infeftment could thereafter be expedite in virtue of it.

**524.** A definite precept is limited to one manner of holding (*a me* or *de me*, but not alternative), and an indefinite precept is applicable to more than one manner of holding (*a me vel de me*). In the feu-charter the manner of holding necessarily is and has always been expressly *de me*. Where a deed specifies or implies one manner of holding only, the precept, although indefinite in its terms, will be construed as definite, and therefore as directing infeftment to be given so as to constitute that holding and no other.<sup>7</sup> “The true criterion by which to determine whether a precept, conceived in terms indefinite or ambiguous, is public or base is found in the obligation to infeft. If it be an obligation to infeft by two manners of holding, one to be held ‘*de me*,’ the other ‘*a me de superiore meo*,’ the precept is alternative. If it be only to be held ‘*a me de superiore meo*’ it is a public precept, and no sasine can proceed upon it that will be effectual without confirmation. If it be to hold ‘*de me*,’ the precept is base, and cannot be confirmed to the effect of creating a public holding.”<sup>8</sup> It was not essential that the precept should specify the symbols of delivery, although it usually did so.<sup>9</sup>

**525.** Like procuratories of resignation, precepts of sasine could not, prior to the Act 1693, c. 35, be used after the death of either the granters or grantees of them. But that Act declared “that procuratories of resignation and precepts of seisin, either already granted or to be granted, shall in all time coming continue in full force and be sufficient warrants, not only for making of resignations and taking seisins in favours of the parties to whom they are or shall be granted, but likewise in favours of their heirs, assignees, and successors having right to the said procuratories and precepts, either by a general service, or by disposition and assignation, or by adjudication, as well after as before the death of the granters or parties to whom they are granted, or both, providing always that the instruments of resignation and seisins taken after the death of either party express the titles of these in whose

<sup>1</sup> See, e.g., *Guthries v. Laird of Guthry*, 1677, 3 Bro. Supp. 140, and *Moncrieff*, 1830, 8 S. 416.

<sup>2</sup> *Kibbles v. Stevenson*, 1830, 9 S. 233; affd. 1831, 5 W. & S. 553; 2 Ross’s L.C. 109; *Young v. Leith*, 1847, 9 D. 932; affd. 1848, 2 Ross’s L.C. 103.

<sup>3</sup> *Kibble v. Shaw Stewart*, 16th June 1814, F.C.; *Town Council of Brechin v. Arbuthnot*, 1840, 3 D. 216.

<sup>4</sup> *Lord Erskine*, 1743, 5 Bro. Supp. 732.

<sup>5</sup> *Carnegie v. Scott*, 1796, Mor. 8858.

<sup>6</sup> *Kibble v. Shaw Stewart*, *supra*; *Watson v. Baxter*, 1818, Hume, 718; *Fulton v. M’Allister*, 1831, 9 S. 442.

<sup>7</sup> See *Rowand v. Campbell*, 1824, 3 S. 196; *Peebles v. Watson*, 1825, 4 S. 290.

<sup>8</sup> Bell, Prin., s. 820.

<sup>9</sup> *Barstow v. Stewart*, 1858, 20 D. 612.



favours the resignation is made and to whom the sasine is granted, and that the same be deduced therein, otherwise to be void and null.”<sup>1</sup> A precept of sasine, however, cannot be assigned by the granter of it, even although the latter has power to revoke the deed in which it is contained.<sup>2</sup> A precept of sasine may be executed though the granter has in the interval disposed the superiority under reservation of feu-rights.<sup>3</sup>

#### SUBSECTION (3).—*Infestment.*

**526.** There are three cardinal principles on which the law regarding the taking of infestment is based: (1) that the property must be delivered by the disponent to the disponentee, according to the maxim *traditionibus, non nudis pactis, transferuntur rerum dominia*; (2) that the only evidence of delivery prior to the Titles to Land Act, 1858, was an instrument of sasine, whence arose the maxim *nulla sasina nulla terra*; and (3) that instruments of sasine, to divest the former proprietor and invest the disponentee, or, in other words, to confer a real right on the person in whose favour they are expedite, must be registered in the register of sasines. The ceremony of delivery, prior to the Infestment Act, 1845,<sup>4</sup> will be described presently. From the nature of lands—which, unlike moveables, cannot pass by delivery from hand to hand—it follows that then, as now, the *traditio* applicable to them was symbolical. At first, when proper investiture existed, there was, as has been explained, no need in a transference of property for any writing; then came the stage of improper investiture in which the *breve testatum* was used, directing possession to be given, the *breve testatum* being either sealed in attestation of the delivery, or followed by a separate declaration by the bailie of the fact that delivery had been given; but for a long time the instrument of sasine under the hand of a notary public was a necessary solemnity for perfecting a feudal right in the disponentee. The instrument of sasine, according to Craig, arose from the want of certainty, and the frauds which occurred in connection with the delivery of possession, and from the consequent need of evidencing the fact that possession had in reality been given.<sup>5</sup> Craig conjectures that instruments of sasine were not used in Scotland till the return of James I. from England in 1424;<sup>6</sup> but Erskine points out that many instruments of sasine are extant dated about the beginning of the fifteenth century, and prints an instrument dated November 1400.<sup>7</sup> Before instruments of sasine were introduced, possession was necessary to give a real right in lands;<sup>8</sup> but after instruments of sasine came into use they became the necessary solemnities to evidence that right, and their place could not be supplied by any other means of probation. “Though the superior,” to quote the graphic words of Stair, “with a thousand

<sup>1</sup> See also 8 & 9 Vict. c. 35, s. 9.

<sup>2</sup> *Pringle v. Pringle*, 1890, 17 R. 1229.

<sup>3</sup> Craig, ii. 7, 2.

<sup>4</sup> Ersk. ii. 3, 34.

<sup>5</sup> *Gammell v. Cathcart*, 1849, 12 D. 19.

<sup>6</sup> 8 & 9 Vict. c. 35.

<sup>7</sup> *Ibid.*, ii. 2, 18.

<sup>8</sup> Stair, ii. 3, 16; Ersk. ii. 3, 33.



witnesses should subscribe all the contents of a seisin, it would be of no effect to make a real right without the attest of a notary, in which sense the vulgar maxim is to be understood, *nulla sasina nulla terra*, which is not only necessary to the first vassal, but must be renewed to all his heirs and successors.”<sup>1</sup>

527. Registration was introduced as a means of preventing frauds in connection with the alienation of land. The preamble of the Statute 1617, c. 16, which still remains the basis of our present system of registration of land-rights, runs thus: “Considering the great hurt sustained by His Majestie’s lieges by the fraudulent dealing of parties, who having annallied their lands and received great summes of money therefore, yet by their unjust concealing of some privat right, formerly made by them, render the subsequent alienation done for great sums of money, altogether unprofitable; which cannot be avoided, unlesse the saids private rights be made publick and patent to His Highnes lieges.”

528. From the combined need of an instrument of sasine and of registration of it for the completion of a real right in land, it has followed that an instrument of sasine unrecorded is null to every effect;<sup>2</sup> though the granter of the warrant and his heirs cannot plead the nullity;<sup>3</sup> that an instrument of sasine with an omission *in essentialibus*, although it is recorded, is also inept,<sup>4</sup> an inept infeftment being equal to no infeftment; and that the nullity of an unrecorded sasine is not cured by prescription, prescription not curing intrinsic nullity in a writ.<sup>5</sup>

529. At the ceremony of symbolical delivery five persons appeared: (1) an attorney on behalf of the disponee; (2) the disponent’s bailie; (3) a notary public; and (4 and 5) two witnesses. The disponee’s attorney produced the charter containing the precept of sasine, delivered it to the bailie, and requested him to deliver sasine of the lands. The bailie then handed the deed to the notary public to be read and published. The notary public, having done so, returned the deed to the bailie. The bailie thereupon delivered to the attorney the symbols appropriate to the subjects in the grant: and the attorney, putting a piece of money into the notary’s hands, declared that he took instruments, and called the attention of the witnesses to the fact that he had done so. The whole ceremony was performed on the ground of the lands of which delivery was given.<sup>6</sup>

530. After the ceremony of symbolical delivery the notary public expedes an instrument of sasine in favour of the person in whose favour

<sup>1</sup> Stair, ii. 3, 16; and see Ersk. ii. 3, 34; Menzies, 569; Bell, Conv. i. 649.

<sup>2</sup> *Young v. Leith*, 1844, 6 D. 370; 1847, 9 D. 932; affd. 1848, 2 Ross’s L.C. 103; *Pater son v. Douglas*, 1705, Mor. 13564; affd. 1714, Rob. App. 99; 2 Ross’s L.C. 78; and see *Keith v. Sinclair*, 1703, 4 Bro. Supp. 542; 2 Ross’s L.C. 108.

<sup>3</sup> *Simpson v. Blackie*, 1678, Mor. 13553; *Gray*, 1626, Mor. 13540.

<sup>4</sup> *Davidson v. M’Leod*, 1827, 6 S. 8; 2 Ross’s L.C. 65; *Mackintosh v. Weir*, 1825, 2 Ross’s L.C. 75.

<sup>5</sup> *Crawford v. M’Michen*, 1729, 2 Ross’s L.C. 112.

<sup>6</sup> Menzies, 570; Bell, Conv. i. 650–651.

the delivery had been made. The clause of delivery of possession ran as follows:

After reading and publishing which feu-charter, containing the said precept of sasine, the said bailie received the same again into his hands, and by virtue thereof and of the office of bailiary thereby committed to him, gave and delivered to the said B. heritable state and sasine, real, actual, and corporal possession, of all and whole the lands and others particularly above specified, with the parts and pertinents thereto belonging, lying and described as aforesaid, and here held as repeated *brevitatis causá*, and that by delivery to the said D., as procurator foresaid, of earth and stone of the ground of the said lands [if teinds have been disposed by the charter, then add here “a handful of grass and corn for the said teinds”], with all other symbols usual and necessary, after the form and tenor of the said charter and precept of sasine in all points.

#### SUBSECTION (4).—*The Instrument of Sasine.*

**531.** With regard to the instrument of sasine, it is necessary to make certain explanations. Although it seems never to have been authoritatively settled that the two dates (the calendar year and the regnal year) commonly given in the instrument were essential, when both were given they had to correspond,<sup>1</sup> and although both were given, if one was written on an erasure, the instrument was inept.<sup>2</sup> The date was necessary for fixing the time within which the instrument required to be registered,<sup>3</sup> but an instrument containing the correct date in its proper place was not rendered invalid by a wrong reference to it in a subsequent part of the writ.<sup>4</sup> It was essential that the instrument should bear that the ceremony took place on the ground of the lands,<sup>5</sup> but an objection to an instrument of sasine *ex facie* regular, that sasine had been taken, not on the lands themselves, but on a contiguous spot of land, was not allowed to be proved by witnesses after a delay of twelve years.<sup>6</sup>

**532.** When the charter or other deed of conveyance contained different lands, which were either locally discontinuous or legally distinct, symbolical delivery had to take place on each of the different lands, and the instrument set forth the appearance of the notary public, the witnesses, the attorney, and the bailie on the ground of the lands described in the instrument respectively and successively.<sup>7</sup> “Although the instrument,” says Bell,<sup>8</sup> “commonly and correctly bears that sasine was given on the lands of the several parcels respectively and successively, yet where the expression is not exclusive of this fact (as that sasine was taken ‘on the ground of the said lands’), and the words

<sup>1</sup> *Town Council of Brechin v. Arbuthnot*, 1840, 3 D. 216; *Lindsay v. Giles*, 1844, 6 D. 771; and see Lord Curriehill in *M'Farlan*, 1853, 15 D. 708.

<sup>2</sup> *Smith v. Ranken*, 1835, 13 S. 461; *affd.* 1840, 1 Rob. 173; and see *Dickson's Trs. v. Goodall*, 1820, Hume, 925.

<sup>3</sup> *M'Queen v. Nairne*, 1823, 2 S. 637.

<sup>5</sup> Bell, *Conv.* i. 652.

<sup>7</sup> Bell, *Conv.* i. 659; *Menzies*, 575.

<sup>4</sup> *Gordon v. Brodie*, 1773, 5 Bro. Supp. 587.

<sup>6</sup> *Campbell v. Campbell*, 1819, Hume, 723.

<sup>8</sup> *Prin.*, s. 871.

are such as accord with the supposition of the correct delivery of sasine, it seems to be sufficient.<sup>1</sup> Where the words are exclusive of the supposition of successive acts (as if the instrument should bear that sasine was taken on a particular spot), it will be bad as to all the separate portions." Lands were deemed legally distinct when they were held (a) by different tenures; (b) by different titles, even of the same superior; or (c) of different superiors.<sup>2</sup>

**533.** Separate acts of symbolical delivery were also necessary when the deed contained, in addition to lands, other tenements (*e.g.* salmon-fishings) for which earth and stone were not the appropriate symbols.<sup>3</sup> When, however, lands either locally discontinuous or legally distinct, or lands with teinds, fishings, etc., had been erected into a barony, delivery could be made by the symbols of earth and stone for the lands and other subjects at the place appointed by the charter of barony, or, if no place was so appointed, then on any part of the lands.<sup>4</sup> Further, the Crown could, by a clause of union in a charter, unite subjects locally discontinuous, or requiring different symbols for delivery; and if in the clause of union a place for delivery was appointed, delivery took place there, but if no such place was appointed, delivery could be given on any part of the united lands.<sup>5</sup> If part of the lands included in a charter containing a clause of union, or part of the lands of a barony, was sold, both the part retained and the part disposed under a feucharter or a disposition had the benefit conferred by the union.<sup>6</sup> A clause of union granted by a subject-superior was ineffectual unless confirmed by the Crown.<sup>7</sup> When lands were neither erected into a barony nor united by a clause of union, the symbols for teinds were delivered on the ground of the lands; those for fishings, at the fishing-station; those for rights of patronage, within the parish church; and those for mills, within the mill.<sup>8</sup>

**534.** Any notary public who was not interested in the transaction could act as notary in giving sasine;<sup>9</sup> and, in one case, an opinion was expressed that a notary was not disqualified from expeding an instrument in execution of a precept of sasine granted by himself.<sup>10</sup> The

<sup>1</sup> See *Maxwell v. Lord Portrack*, 1628, Mor. 14318; *Lord Hermiston v. Butler*, 1630, Mor. 14326; *Gordon v. Brodie*, *supra*.

<sup>2</sup> Bell, Prin., s. 874; Bell, Conv. i. 659; Menzies, 575; Ersk. ii. 3, 44; *Bank of Scotland v. Ramsay*, 1729, Mor. 16404; and see *Rowand v. Walker*, 1837, 15 S. 563.

<sup>3</sup> Bell, Conv. i. 660; and see Ersk. ii. 3, 44.

<sup>4</sup> Ersk. ii. 3, 46; Menzies, 576; Bell, Conv. i. 660.

<sup>5</sup> Bell, Prin., s. 874; Bell, Conv. i. 660; and see *M'Lean*, 1777, 5 Bro. Supp. 590; *Scott v. Bruce Stewart*, 1779, Mor. 13519; *Montgomerie v. Dalrymple*, 2nd March 1813, F.C.; *Whitefoord v. Whitefoord*, 1788, 3 Pat. 101; *Edmonstone v. Morehead*, 1791, 3 Pat. 199; *Napier v. Grierson*, 1822, 1 S. 522.

<sup>6</sup> *Blairquhen*, 1637, Mor. 16401; *Heron v. Syme*, 1771, Mor. 8684; *Wood's Trs. v. Ferrier*, 1832, 10 S. 773; *affd.* 1834, 7 W. & S. 147 (dispensation extends to rights in security); *Skene and Hunter v. Ogilvie*, 1768, Mor. 8792; *rev.* 1768, 2 Pat. 141; *Lyall v. Skene*, 1768, 2 Pat. 138; *Brown v. Kyd*, 1813, Hume, 717; *Montgomerie v. Dalrymple*, 2nd March 1813, F.C.

<sup>7</sup> *Aitken v. Lord Grinislaw*, 1623, Mor. 16397; *Borthwick v. Ker*, 1636, Mor. 16401.

<sup>8</sup> Bell, Conv. i. 660.

<sup>9</sup> *Ibid.*, i. 652.

<sup>10</sup> Per Lord Gillies in *Sim v. Clark*, 1831, 10 S. 85.



notary public was entitled to assume that any person in possession of the warrant containing the precept was duly empowered to act as attorney,<sup>1</sup> and an attorney could represent any number of disponces,<sup>2</sup> although it was open to those interested to shew that sasine had been taken without their authority.<sup>3</sup> If there was no doubt about the identity of the attorney or the bailie, the fact that either was not fully named and designed was treated as a latent ambiguity, not invalidating the instrument;<sup>4</sup> and where an instrument bore that the same person acted as both bailie and attorney, it was sustained, as it appeared otherwise from the writ that a person other than the bailie had demanded sasine.<sup>5</sup>

**535.** In an old case<sup>6</sup> an instrument of sasine was sustained, there being no competition, although it did not set forth the precept of sasine; but practice established the rule that the precept of sasine contained in the charter should be inserted at full length in the instrument of sasine,<sup>7</sup> subject to this, that it was sufficient to insert as much of the precept, if it contained a description of different lands, as related to that part of them in which infestment was being taken.<sup>8</sup> The testing clause was engrossed *verbatim*, in order to connect the warrant produced as the deed of the granter with the delivery given in pursuance of it.<sup>9</sup> If the deed containing the precept was sufficiently identified, an error or omission in a reference to it in the instrument was not fatal.<sup>10</sup> If the person in whose favour infestment was given was not the original grantee, but his heir or successor, the connecting writs had to be deduced,<sup>11</sup> although, if the connecting links were deduced, it was decided, in a case of doubtful authority, not to be essential that the instrument should specially bear that they were received by the bailie from the attorney, or delivered to the notary, or read and published to the witnesses;<sup>12</sup> and it was unnecessary to deduce the commission authorising a factor to assign an unexhausted precept to which his principal had right.<sup>13</sup>

**536.** An instrument of sasine was held invalid which, although it set forth the delivery of the appropriate symbols, did not bear that heritable state and sasine, real, actual, and corporal possession, had

<sup>1</sup> Bell, Conv. i. 653.

<sup>2</sup> *Grant v. Crs. of Tillifour*, 1750, Mor. 14325.

<sup>3</sup> *Gray*, 1838, 1 D. 227.

<sup>4</sup> *Morton v. Hunters & Co.*, 1828, 7 S. 172; *affd.* 1830, 4 W. & S. 379; *Macgillivray v. Campbell*, 1824, 3 S. 378, N.E. 267; and see *Lord Napier v. Livingstone*, 1762, 5 Bro. Supp. 587, 888; *affd.* 1765, 2 Pat. 108; *Duke of Argyll v. Dalgleish's Trs.*, 1873, 11 M. 616.

<sup>5</sup> *Hilton v. Lady Cheynes*, 1676, Mor. 14331; and see *Henderson*, 1776, 2 Ross's L.C. 74; *Douglas v. Chalmers*, 1762, 5 Bro. Supp. 587; *M'Ghie v. Leishman*, 1827, 5 S. 758.

<sup>6</sup> *Lady Lamertoun v. Laird of Polwart*, 1680, Mor. 14309.

<sup>7</sup> Bell, Conv. i. 654.

<sup>8</sup> *Don v. Waldie*, 4th February 1813, F.C.

<sup>9</sup> Menzies, 573; and see *Leith Bank v. Walker's Trs.*, 1836, 14 S. 332.

<sup>10</sup> *Hamilton v. Hamilton*, 1824, 2 S. 640; *Gordon v. Earl of Fife*, 1827, 5 S. 550; *Gordon's Trs. v. Eglinton*, 1851, 13 D. 1381; see also *Duke of Argyll v. Dalgleish's Trs.*, *supra*.

<sup>11</sup> 1693, c. 35.

<sup>12</sup> *Scott and Kerr v. Dalrymple*, 1781, Mor. 8838; and see Duff, 107.

<sup>13</sup> *Proctor v. Carnegie*, 1796, Mor. 8871.



been delivered.<sup>1</sup> Professor Montgomerie Bell states that it was indispensable that the particular symbols used should be set forth in the instrument.<sup>2</sup> In the case of *Urquhart v. H. M. Advocate*,<sup>3</sup> however, an instrument which bore that the usual symbols were delivered was held valid. Professor George Joseph Bell remarks that the judgment in *Urquhart* is not to be relied on absolutely.<sup>4</sup> In any case the specification of a wrong symbol was fatal to an instrument; and where an instrument of sasine set forth, in narrating the delivery of the lands, that the symbol of stone, instead of earth and stone, was used, the sasine was held null.<sup>5</sup> The appropriate symbols were: for land and its accessories, earth and stone; for salmon-fishings, net and coble; for a mill, when a separate tenement, clap and happer; for teinds, a handful of grass and corn; for annual rent of money, one penny money; for annual rent of victual, a parcel of corn or victual; for right of ferry, an oar and some water; for the right of patronage of a parish church, a psalm-book and the keys of the church; and for houses held burgage when sasine was in favour of an heir, hasp and staple, and sometimes earth and stone as well as hasp and staple.<sup>6</sup>

**537.** From the principle of the feudal law which forbids any but natural persons or corporations to be vassals in land, an infeftment in favour of a firm (e.g. in favour of Robert Muirhead & Company) is inept: <sup>7</sup> but one in favour of a named partner of a firm and the other partners of the firm, will operate effectually in favour of the named partner, on the ground that it is equivalent to an infeftment for himself and the other partners.<sup>8</sup> A firm may hold a lease *socio nomine*,<sup>9</sup> and there is no reason to hold that a firm may not *socio nomine* hold an unfeudalised fee and even transmit it. The objection applies to the feudal relationship constituted by infeftment, and therefore would appear not to apply to the firm holding *socio nomine* recorded titles to long leases and real burdens, neither of which are feudal assets. As there can be no successive fee in favour of two or more parties constituted at the same time, no valid infeftment can be given to successive fiars, e.g. to A., whom failing, B., whom failing, C. But if infeftment is so taken to successive fiars, the inept infeftment in favour of the others after the first will not invalidate the infeftment in his favour, for *utile per inutile non vitiatur*.<sup>10</sup>

**538.** Where a notary by mistake inserted in an instrument of sasine the words *in dimidietate tertiæ partis* in place of *trium partium*, the words

<sup>1</sup> *Davidson v. McLeod*, 1827, 6 S. 8; 2 Ross's L.C. 65; and cp. *Lady Lamertoun v. Home of Polwart*, 1682, Mor. 14321.

<sup>2</sup> Bell, Conv. i. 655. <sup>3</sup> 1753, Mor. 9921; affd. 1755, 1 Pat. 586. <sup>4</sup> Bell, Prin., s. 871.

<sup>5</sup> *Town Council of Brechin v. Arbuthnot*, 1840, 3 D. 216.

<sup>6</sup> Bell, Conv. i. 655; Menzies, 573; Duff, 100; Ersk. ii. 3, 36.

<sup>7</sup> *Morison v. Miller*, 1818, Hume, 720; 2 Ross's L.C. 24.

<sup>8</sup> *Denniston v. Macfarlane*, 1808, Mor. No. 15, App. Tack; 2 Ross's L.C. 23.

<sup>9</sup> *Denniston*, *supra*.

<sup>10</sup> *Ker v. Howison*, 1708, 2 Ross's L.C. 25; *Paul v. Boyd*, 1833, 11 S. 292; 2 Ross's L.C. 26.

were taken as they stood, so as to limit the right to the half of a third.<sup>1</sup> The object of specifying in the instrument of sasine the hours between which sasine was given was to shew that the ceremony was performed by daylight.<sup>2</sup> When infeftment was given in different parcels of land on different days, it was not essential to specify the particular parcels in which infeftment was given each day,<sup>3</sup> and an objection to an instrument of sasine that it had not been taken in daylight,<sup>4</sup> or that it did not specify whether the time when sasine was taken was before or after noon,<sup>5</sup> was repelled.

**539.** While the body of the instrument could be written by anyone,<sup>6</sup> the notarial docquet had to be holograph of the notary. The omission from the docquet of the statement that the notary was present with the witnesses at the transaction set forth in the instrument was fatal.<sup>7</sup> An immaterial omission from, or a grammatical or clerical error in, the docquet did not invalidate the instrument.<sup>8</sup> The instrument of sasine required to be signed on each leaf by one notary<sup>9</sup> and two witnesses.<sup>10</sup> When the deed consisted of more than one sheet, the pages had to be numbered, and the notarial docquet had to set forth the number of pages of which the deed consisted,<sup>11</sup> and each leaf had to be signed by the notary and the witnesses.<sup>12</sup> The reason for the signing of each leaf by the witnesses was that they were witnesses to the facts narrated in the instrument—not simply to the subscription of the notary. When the instrument was written on one sheet it was unnecessary to number the pages or to mention their number in the docquet, and subscription by the notary and the witnesses at the close of the document was sufficient.<sup>13</sup> The witnesses' designations had to be inserted in all cases in the instrument of sasine.<sup>14</sup>

#### SUBSECTION (5).—*Registration of Instrument of Sasine.*

**540.** After the granting of the feu-charter, symbolical delivery, and the expeding of an instrument of sasine, it was necessary before 1845, for the completion of a feudal title in the person of the disponee, to secure the registration of the instrument, within sixty days of its date, in the appropriate register of sasines. The essentials of registration

<sup>1</sup> *Murray v. Murray*, 1708, 4 Bro. Supp. 701.

<sup>2</sup> Bell, Conv. i. 656.

<sup>3</sup> *M'Lean v. Duke of Argyle*, 1777, 5 Bro. Supp. 590.

<sup>4</sup> *Arnot v. Turner*, 1679, Mor. 14332.

<sup>5</sup> *Dennistown v. Speirs*, 1824, 3 S. 285.

<sup>6</sup> Bell, Conv. i. 656; see *Dickson v. Syme*, 1801, Mor. App. Tailzie, 7.

<sup>7</sup> See *Prinrose v. Dury*, 1612, Mor. 14326; *Mackintosh v. Weir*, 1825, 4 S. 190; 2 Ross's L.C. 75.

<sup>8</sup> *M'Ghie v. Leishman*, 1827, 5 S. 758; *Dickson v. Cuninghame*, 1829, 7 S. 503.

<sup>9</sup> 1584, c. 4.

<sup>10</sup> *Bishop of Aberdeen v. Viscount of Kenmure*, 1680, Mor. 3011.

<sup>11</sup> Act of Sederunt, 17th January 1756; *Copland v. Busby*, 1771, Mor. 8686.

<sup>12</sup> 1686, c. 17; see *Carnegie v. Scott*, 1796, Mor. 8858.

<sup>13</sup> *Kirkham v. Campbell*, 1822, 1 S. 423.

<sup>14</sup> 1681, c. 5; and see *Stewart v. Stewart*, 2nd March 1815, F.C.

of an instrument of sasine relating to subjects held feu<sup>1</sup> before 1845 were as set out in the three next following paragraphs.

(i) *Entry in Minute-book.*

541. The first requisite was the entry in the minute-book of the instrument within sixty days of its date, the minute of entry being signed by the keeper of the record (or his depute) and the presenter of the writ.<sup>2</sup> An instrument of sasine was held as recorded from the time when it was entered in the minute-book, although the engrossing did not take place until after the sixty days;<sup>3</sup> and if more than one instrument of sasine, affecting the same property, were lodged at the same time, the one first entered in the minute-book was preferred<sup>4</sup> in the absence of a clause in the instruments to the effect that they were to be ranked *pari passu*.<sup>5</sup> When instruments of sasine were entered in the minute-book, and not transcribed into the register in the order of the minute-book, the preference depended on the minute-book.<sup>6</sup> The rule for computing the time within which an instrument of sasine could be recorded was by days, counting from midnight to midnight, and excluding the day on which the act of delivery was done, as the *terminus a quo*.<sup>7</sup> A discrepancy between the entry in the minute-book and the register was not fatal.<sup>8</sup>

(ii) *Transcription in the Register.*

542. The instrument of sasine required to be transcribed *ad longum* in the register. Any error in essentials in the record,<sup>9</sup> or an erasure or other vitiation, not authenticated, in a material word or clause in the record, was fatal to the validity of the recording of the instrument.<sup>10</sup> With regard to erasures not authenticated in instruments of sasine,<sup>11</sup> the common law was applicable,<sup>12</sup> until the passing of the Act 6 & 7 Will. IV. c. 33, which enacted that no challenge of any instruments of sasine or of resignation *ad remanentiam* (exclusive, however, of instru-

<sup>1</sup> 1617, c. 16; 1672, c. 16; 1686, c. 19; 1693, c. 13; 1693, c. 14; 1696, c. 18; Act of Sederunt, 12th June 1756.

<sup>2</sup> See *Skelly v. Duff*, 1774, 5 Bro. Supp. 589.

<sup>3</sup> *MacLaine v. MacLaine*, 1852, 14 D. 870; affd. 1855, 18 D. (H.L.) 44; *Beaumont v. Earl of Cassillis*, 1716, Mor. 13571; *Dunbar v. Sutherland*, 1790, Mor. 8799.

<sup>4</sup> *Douglas v. Dunlop*, 1835, 13 S. 505.

<sup>5</sup> Bell, Conv. i. 669.

<sup>6</sup> *MacLaine*, *supra*; and see *Cardross v. Foulis*, 1678, Mor. 13554; *Earl of Mar v. Lady Kincardine*, 1684, Mor. 13557; *Drummond v. Ramsay*, 24th June 1809, F.C.; *Adam v. Duthie*, 19th June 1810, F.C.

<sup>7</sup> *Lindsay v. Giles*, 1844, 6 D. 771.

<sup>8</sup> *MacLaine*, *supra*.

<sup>9</sup> *Grey v. Hope*, 1790, Mor. 8796; *M'Queen v. Nairne*, 1823, 2 S. 637; *Stewart v. Earl of Fife*, 1827, 5 S. 383; *Dennistoun v. Speirs*, 1824, 3 S. 285.

<sup>10</sup> *Drummond v. Ramsay*, 24th June 1809, F.C.; and cp. *Adam v. Duthie*, 19th June 1810, F.C.; *Gibson-Craig v. Cochran*, 1838, 16 S. 1332.

<sup>11</sup> *Anderson v. Anderson*, 1828, 6 S. 463.

<sup>12</sup> *M'Millan v. Campbell*, 1831, 9 S. 551; *Innes v. Earl of Fife*, 1827, 5 S. 559; affd. 1827, 2 W. & S. 637; *Smith v. Ranken*, 1835, 13 S. 461; affd. 1840, 1 Rob. App. 173; and see *Howden v. Ferrier*, 1835, 13 S. 1097; *Morton v. Hunters & Co.*, 1828, 7 S. 172; affd. 1830, 4 W. & S. 379; Bell, Conv. i. 671.

ments of sasine or resignation and sasine *propriis manibus*) should receive effect either by reduction or exception, on the ground that any part of the instrument was written on an erasure, unless it should be averred and proved that the erasure had been made for the purposes of fraud, or that the record thereof was not conformable to the instrument as presented for registration. In one case, where the day of the month and the year of the King's reign were written in a marginal note not authenticated, objection on that ground to the validity of the instrument was repelled.<sup>1</sup> Although the rule was that the record could not be altered after the expiry of the sixty days,<sup>2</sup> the Court in one or two cases allowed an omission to be supplied under the reservation of the rights of third parties ;<sup>3</sup> but the proper remedy for an error or other defect in the recording, as in the case of the instrument of sasine itself, was the expeding and recording of a new instrument.<sup>4</sup>

### (iii) Certificate of Registration.

543. A certificate of registration required to be written on the instrument of sasine by the keeper of the register. This certificate bore the date of presentment and the fact of registration, and referred to the book and the pages of the book in which the instrument was engrossed. In the case of *Gibson-Craig v. Cochran*,<sup>5</sup> where an erasure occurred in the attestation as well as an error in its date, the minute-book and register corresponding, the instrument was held sufficient. Where the keeper had omitted to sign the certificate, the Court, *ex nobili officio*, authorised his successor in office to sign it, and generally authority will be given to the succeeding keeper to complete the registration of writs given in during his predecessor's term of office.<sup>6</sup>

## SECTION 3.—CHARTER AND INFECTMENT AFTER THE INFECTMENT ACT, 1845, TILL THE LANDS TRANSFERENCE ACT, 1847.

### SUBSECTION (1).—*New Form of Precept of Sasine.*

544. The only alteration made by the Infectment Act, 1845, on the form of the feu-charter formerly in use was in the precept of sasine. The Act enacted (s. 5) that the precept of sasine might be in the following form :

Moreover I desire any notary public to whom these presents may be presented, to give to the said A. B., or his foresaids, sasine of the lands and others above disposed.

<sup>1</sup> *MacLaine, supra.*

<sup>2</sup> *Dundas v. Dennistoun*, 1824, 3 S. 400.

<sup>3</sup> *Duke of Montrose, Pctr.*, 1846, 8 D. 822 ; see also *Tait, Pctr.*, 1822, 1 S. 241.

<sup>4</sup> *Haig v. Haigs*, 1857, 19 D. 449 ; *Kibbles v. Stenerson*, 1830, 9 S. 233 ; *affd.* 1831, 5 W. & S. 553 ; and see *Watson v. Baster*, 1818, Hume, 718 ; Bell, Conv. i. 671.

<sup>5</sup> 1838, 16 S. 1332 ; *affd.* 1841, 2 Rob. 446.

<sup>6</sup> *Young, Pctr.*, 1749, Mor. 13575 ; *Herries, Pctr.*, 1750, Mor. 13575 ; *Ballantine, Pctr.*, 1749, Mor. 13575 ; *Mays, of Elgin, Pctr.*, 1885, 12 R. 1136 ; *Cowper, Pctr.*, 1885, 12 R. 415 ; *Hepburn, Pctr.*, 1905, 7 F. 484.



SUBSECTION (2).—*New Form of Sasine and Infefment.*

**545.** The Act further provided (1) that it should not be necessary to proceed to the lands in which sasine was to be given, or to perform any act of infefment thereon or anywhere, but that sasine should be effectually given and infefment obtained by producing to a notary the warrants of sasine and relative writs as then in use to be produced at taking infefment, and by expeding and recording in the sasine register an instrument of sasine in an abbreviated form, containing an operative clause by which the notary thereby gave sasine, subscribed by the notary and witnesses; (2) that the infefment should be effectual whether the lands lay contiguous or discontiguous, or were held by the same or by different titles, or of one or more superiors, or whether the deed entitling the party to obtain infefment was dated prior or subsequent to the Act, or whether the precept of sasine was in the old or new form; (3) that the instrument of sasine, on being recorded, should in all respects have the same effect as if sasine had been taken, and an instrument of sasine had been recorded, according to the previous law and practice; (4) that every instrument of sasine might be recorded at any time during the life of the party infeft, but that the date of presentment and entry set forth on any such instrument by the keeper of the record should be taken to be the date of the instrument of sasine and infefment.

**546.** The testing clause in the new (1845) form of sasine contained no date, the date of presentment and entry set forth on the instrument by the keeper of the record being, under the Act, held to be the date of the instrument and infefment.<sup>1</sup> The notary public signed each page, but the witnesses, being no longer witnesses to the giving of sasine, but simply witnesses to the notary's subscription, required, according to the general practice following on the Act,<sup>2</sup> to sign the last page only.

## SECTION 4.—CHARTER AND INFETMENT AFTER THE LANDS TRANSFERENCE ACT, 1847, TILL THE TITLES TO LAND ACT, 1858.

**547.** The Lands Transference Act, 1847, made it lawful, but not imperative, to insert in dispositions and conveyances, and other deeds and instruments necessary for the transmission of lands and other heritages not held burgage, short statutory forms of the principal clauses, instead of the longer forms then in use. It is apparent from its provisions that the Act of 1847 had in view primarily the form of a disposition as opposed to a feu-charter or other original feu-right; but appended to Schedule (A) there is a note to the effect that, while the clauses given in the schedule were assumed as occurring in a disposition, they might be used in other deeds and instruments, and that in the event of its being necessary to omit, vary, or qualify any one or

<sup>1</sup> See Menzies, 585; Bell, Conv. i. 657.

<sup>2</sup> Menzies, 591.

more of them, this might be done, and the other clauses might be retained. The Lands Transference Act, 1847, made no change as regards infektment.

SECTION 5.—CHARTER AND INFECTMENT BETWEEN 1858 AND 1868.

SUBSECTION (1).—*Recording of Conveyance.*

548. The Titles to Land Act, 1858, while providing that nothing contained in it should prevent the constitution, transmission, or completion of land-rights by the forms in use prior to the passing of the Act (s. 20), contained important provisions as to both the form of deeds of conveyance and infektment. The provisions, so far as relevant to the present subject, may be mentioned in the order in which they are set forth in the Act. The Act provided: (1) that from and after 1st October 1858 it should not be necessary to expedite and record an instrument of sasine on any conveyance of lands, but that it should be sufficient for the person or persons in whose favour the conveyance was granted, instead of recording an instrument of sasine, to record the conveyance itself, with a warrant of registration thereon, in the form of Schedule (A) of the Act, in his or their favour, in the appropriate register of sasines (s. 1); (2) that where a conveyance of lands was contained in a deed granted for further purposes and objects, such as a marriage contract, deed of trust, or deed of settlement, or where a deed conveyed separate lands, or separate interests in the same lands, to the same or different persons, it should not be necessary to record the whole of such deed, but that it should be sufficient to expedite and record in the appropriate register of sasines a notarial instrument setting forth generally the nature of the deed, and containing at length, in the case of a deed granted for further purposes and objects, those portions of the deed by which the lands were conveyed, and by which real burdens, conditions, or limitations were imposed, and in the case of a deed conveying separate lands, or separate interests in the same lands, to the same or different persons, the part or parts of the deed by which such particular lands were conveyed to the person or persons in whose favour the notarial instrument was expedite, and the part of the deed which specified the nature and extent of the right and interest of such person or persons, with the real burdens, conditions, and limitations, if any (s. 2); (3) that immediately before the testing clause of any conveyance it should be competent to insert a clause of direction in the form of Schedule (C) to the Act, specifying the part or parts of the conveyance which the granter desired to be recorded in the register of sasines; and that where such clause was inserted the keeper of the register should record such part or parts only, together with the clause of direction and the testing clause, and that the recording of such part or parts of the conveyance, together with the clause of direction and the testing clause and the warrant of registration, should have the same legal effect as if a notarial instrument containing such part or parts of

the conveyance had been duly expedite and recorded in favour of the party on whose behalf the conveyance was presented (s. 3). Notwithstanding a clause of direction, it was competent by the Act to record, with warrant of registration, the whole deed; and if the deed containing such a clause of direction was granted for further purposes and objects than the conveyance of land, or conveyed separate lands or separate interests in the same lands, a notarial instrument could be expedite and recorded, but it was declared that no part or parts of the conveyance directed to be recorded should be omitted from the notarial instrument; <sup>1</sup> (4) that it should not be necessary to insert in any conveyance a precept of sasine or warrant for infeftment (s. 5).

#### SUBSECTION (2).—*Notarial Instrument.*

**549.** The Act also provided that where a party should have granted or should grant a general conveyance of his lands, by deed either *mortis causa* or *inter vivos*, it should be competent to the disponee under such conveyance, or to any other party who should have acquired right to such conveyance, in whole or part, by service, assignation, adjudication, or otherwise, to complete his title by expediting and recording a notarial instrument in the form of Schedule (H), but under the provision that where such notarial instrument should be expedite by a party other than the original disponee under such general disposition, the instrument should set forth the title or series of titles by which the party in whose favour the instrument was expedite acquired right to such conveyance, and the nature and extent of his right.<sup>2</sup>

#### SUBSECTION (3).—*Description by Reference.*

**550.** The 1858 Act introduced the idea of statutory descriptions of the property by reference. It enacted that where lands had been particularly described in any prior conveyance or other writ, recorded in the appropriate register of sasines, it should not be necessary in any subsequent conveyance or writ containing or referring to the whole or any part of such lands, to repeat the particular description of the lands at length, but that it should be sufficient to describe them by reference in the way afterwards to be detailed.<sup>3</sup>

#### SUBSECTION (4).—*Other Provisions of 1858 Act.*

**551.** The Act of 1858 also provided that all conveyances, with warrants of registration, and all notarial instruments authorised by the Act to be recorded in the register of sasines, might be recorded at any time during the life of the party on whose behalf the same should be

<sup>1</sup> Sec. 3; also 23 & 24 Vict. c. 143, s. 25.

<sup>2</sup> Sec. 12; see *Smith v. Wallace*, 1869, 8 M. 204.

<sup>3</sup> See s. 15 and s. 34 of 23 & 24 Vict. c. 143; and as to use of general name for several lands, s. 16.



presented for registration in the same manner as instruments of sasine were recorded, and that the date of entry in the minute-book should be held to be the date of registration, and that the date of registration should be equivalent to the date of registration of instruments of sasine according to the law and practice then existing;<sup>1</sup> that extracts of all conveyances, warrants of registration, and notarial instruments recorded in terms of the Act should make faith in all cases except where the recorded writ should be offered to be improven (s. 19); that in case of any error or defect in any notarial instrument expedite or to be expedite in virtue of the Act, or of the Act 8 & 9 Vict. c. 35, or in the recording of any such instrument, or of any conveyance or warrant of registration recorded or to be recorded in the register of sasines in virtue of the Act, it should be competent of new to make and record a notarial instrument, or of new to record the conveyance with the original or a new warrant of registration, and that such notarial instrument so expedite and recorded, or such conveyance so of new recorded, with the original, or a new warrant of registration, as the case might require, should, from the date of recording thereof, have the same effect as if no previous notarial instrument had been expedite or recorded, or as if such conveyance and original warrant of registration had not been previously recorded;<sup>2</sup> and that the Act of 6 & 7 Will. IV. c. 33 should extend and be applicable to notarial instruments authorised by the Act, and to notarial instruments expedite and to be expedite under the Act 8 & 9 Vict. c. 35.<sup>3</sup>

SUBSECTION (5).—*General Effect of 1858 Act.*

**552.** With regard to the form of the charter, the Titles to Land Act, 1858, as the provisions referred to shew, made it unnecessary to insert a precept of sasine, and allowed, in place of a full description of the lands, a short description of them in statutory form, but indeed the provisions for shortened descriptions have only a qualified or secondary reference to feu-charters. The reason is that in a charter there has to be a "new" description, with or without a plan signed as relative to the charter. The new detailed description commonly proceeds to state of what lands the feu forms a part, and at that stage the statutory provisions for descriptions by reference become useful even in a feu-charter.

**553.** The changes effected by the 1858 Act in constituting the feudal relationship, or in taking infeftment under a charter, were important. If the charter contained a particular description of the lands, or a description of them by reference in the form allowed by the Act, and whether it did or did not contain a precept of sasine, the disponent could take infeftment by recording it, with a warrant of registration in his favour. If the feu was contained in a deed granted for further purposes and objects, or if the deed containing the feu conveyed separate lands

<sup>1</sup> 21 & 22 Vict. c. 76, s. 19.

<sup>2</sup> Sec. 31, as altered by s. 35 of 23 & 24 Vict. c. 143.

<sup>3</sup> Sec. 33, as corrected by s. 37 of 23 & 24 Vict. c. 143.



or separate interests in the same lands to the same or different persons, the donee, in any of these cases, provided the lands feued to him were described sufficiently, could complete his title either by recording the whole of the deed containing the lands feued; or, if the deed contained a clause of direction, by recording the parts of the deed relating to the lands feued; or, whether or not the deed contained a clause of direction, by expeding and recording a notarial instrument in the form of Schedule (B) to the Act. In all cases where a charter (or other conveyance) contained a precept of sasine applicable to the lands, the donee could also complete title by having expedite and recorded an instrument of sasine, which, if the precept was in the form in use prior to the Infestment Act, 1845, could be in the form given in the Act, or in the long form in use prior to the Act, but which, if the precept of sasine was in the form introduced by the Act, had to be in the form given in the Act. If the deed containing the feu described the lands only in general terms, *e.g.* "all the lands belonging to me," then, whether it did or did not contain a precept of sasine, the donee under it could not complete his title *de plano* by recording the deed; but he could either expedite and record a notarial instrument in terms of Schedule (H) to the 1858 Act, or, if it contained a precept of sasine, expedite and record an instrument of sasine; whether a notarial instrument or an instrument of sasine was expedite, it had to narrate the donor's infestment in the lands disposed, and deduce the deed containing the general conveyance of them. Regarding what has been above stated about registration, it has to be observed that the charter, the notarial instrument, and, if in the form introduced by the Infestment Act, 1845, the instrument of sasine, could be recorded at any time within the life of the party on whose behalf they were presented for registration.

554. The Titles to Land Act, 1858, did not apply to property held burgage, but its provisions were extended to burgage property by the Titles to Land Act, 1860.<sup>1</sup> The latter Act made various amendments on the Act of 1858, but the only point of which notice need be taken here is that the Act of 1860 enacted that, in the absence of a reference in a warrant of registration to a clause of direction in a deed, the deed should be engrossed in the register as if it had contained no clause of direction, and introduced a form of warrant of registration applicable to cases in which the clause of direction was to be acted on.<sup>2</sup>

## SECTION 6.—CHARTER IN THE PRESENT FORM.

### SUBSECTION (1).—*Preliminary.*

555. The feu-charter and infestment in their present form are chiefly regulated by the Titles to Land Consolidation Act, 1868, the Conveyancing Acts, 1874 and 1924, and the Feudal Casualties Act, 1914. It is proposed to deal *seriatim* with each of the clauses of the modern feu-charter.

<sup>1</sup> 23 & 24 Vict. c. 143.

<sup>2</sup> *Ibid.*, s. 25.

SUBSECTION (2).—*Narrative Clause.*

**556.** This clause sets forth (1) the names and designations of the parties, and (2) the cause of granting.

The expression “heritable proprietor” implies that the disposer is infeft in the lands,<sup>1</sup> and the practice is to have the title of the granter of a feu-charter or disposition completed prior to a grant by him. But infeftment in virtue of a feu-charter or a disposition granted by a person having only a personal title, or even no title, will be validated *accretione* by his subsequent infeftment, even although it takes place subsequent to his disponee’s death, for accretion operates whether a disposer simply completes his title or first acquires and then completes his title subsequent to the date of the grant made by him (see ACCRETION). Further, s. 3 of the 1924 Act provides for the granter’s title being deduced in the deed, which makes his deed a warrant for the *de plano* infeftment of the grantee. If the true owner is a consenter to a conveyance granted by a person who has an interest (*e.g.* a liferenter),<sup>2</sup> or even no interest,<sup>3</sup> the conveyance will be effectual; but if a mere consenter to a conveyance subsequently acquires rights to the land in the conveyance, his consent will not import a conveyance of these rights, unless he has expressly bound himself in absolute warrandice, his consent being construed with reference only to the rights vested in him at the time of consenting, and there being no implied warrandice against him.<sup>4</sup>

SUBSECTION (3).—*Dispositive Clause.*

**557.** The dispositive clause is the ruling clause in a conveyance of lands. It contains (a) the appropriate words of conveyance; (b) the name and designation of the disponee, if not already given in the narrative clause, and the destination; (c) a description of the lands; and (d) reservations, burdens, etc., it being essential that these shall be contained in the dispositive clause.<sup>5</sup>

(i) *Words of Conveyance.*

**558.** As to the appropriate words of conveyance, it is usual for the disposer, in a feu-charter, to *sell and in feu (or blench) farm dispone*, if the charter is for onerous consideration, and *to give, grant, and in feu (or blench) farm dispone*, if the charter is not for onerous consideration. The general opinion was and is that the word “dispone” was indispensable in an *inter vivos* conveyance of land, coming into operation

<sup>1</sup> Duff, 59; Bell, Conv. i. 580.

<sup>2</sup> *Moncrief v. Cockburn’s Trs.*, 1691, 2 Bro. Supp. 129; *Sorley’s Trs. v. Grahame*, 1832, 10, S 319; 1 Ross’s L.C. 41.

<sup>3</sup> Ersk. ii. 3, 21; *Buchan v. Cockburn*, 1739, Mor. 6528; 1 Ross’s L.C. 33; *Mounsey v. Marwell*, 1808, Hume, 237; *Stirling*, 1630, Hume, 238.

<sup>4</sup> *Forbes v. Innes*, 1668, Mor. 7759; *Stuart v. Hutchison*, 1681, Mor. 7762; Ersk. ii. 7, 4; 1 Ross’s L.C. 33 *et seq.*

<sup>5</sup> Bell, Prin., s. 920; *Cowie v. Muirden*, 1893, 20 R. (H.L.) 81, per Lord Shand.

before the passing (7th August 1874) of the Conveyancing Act, 1874.<sup>1</sup> Sec. 27 of the Conveyancing Act, 1874, provides, however, that "it shall not be competent to object to the validity of any deed or writing as a conveyance of heritage coming into operation after the passing of this Act on the ground that it does not contain the word 'dispone,' provided it contains any other word or words importing conveyance or transference, or present intention to convey or transfer." Professor Montgomerie Bell, speaking of the absence of the word "dispone" from an onerous *inter vivos* conveyance of land under the law as it was prior to the passing of the Conveyancing Act, 1874, says: "Without that word it [the conveyance] may not be effectual as a direct means of divesting the old and investing the new proprietor; but, at all events, it will be effectual as an obligation, and, if necessary, the foundation of a suit at the new proprietor's instance for obtaining a judicial conveyance and investiture—that is, an adjudication in implement."<sup>2</sup> Notwithstanding those legislative changes the inveterate professional practice still is to retain the word "dispone" both in deeds and wills affecting or which may affect heritage, and the real value of the legislation is its effect upon wills made by laymen which are intended to carry heritage.

(ii) *Destination.*

**559.** After the words of alienation come the name of the grantee and the destination. The conveyance in a charter or disposition is generally in favour of the grantee and his heirs and assignees whomsoever. But a conveyance to the disponent alone is equivalent to a conveyance to him and his heirs, or his heirs and assignees; for, fees being now hereditary and transmissible, the words "heirs and assignees" are not essential to enable the disponent to transmit to his heirs, or to convey to a stranger. Accordingly, on the death of the disponent, and in the event of his not having disposed by *inter vivos* deed or by will, his heir-at-law in heritage succeeds to it, just as is the case when the conveyance is to the disponent and his heirs, or his heirs and assignees.<sup>2</sup>

**560.** Nor does the absence from the dispositive clause of mention of the disponent's assignees prevent him from assigning his right and interest in the lands. Prior to the period when proprietors of land had power to disponent their feus to a stranger, it was held that a charter in favour of a disponent and his assignees enabled the disponent to assign his right to the charter at any time before he had taken infeftment.<sup>3</sup> Since, however, the passing of the Act 20 Geo. II. c. 50, all clauses *de non alienando sine consensu superiorum* in a charter have been null. Notwithstanding that Act, a disponent is entitled to, and sometimes does, stipulate for an exclusion of the disponent's assignees before infeftment,

<sup>1</sup> Menzies, 538; Bell, Conv. i. 583 *et seq.*

<sup>2</sup> Bell, Conv. i. 585; and see *Reid v. Young*, 1838, 16 S. 363.

<sup>3</sup> Stair, ii. 4, 32; Ersk. ii. 7, 5; Bell, Conv. i. 587; *Carnegy v. Cranburn*, 1663. Mor. 10375.



and insert a declaration that the conveyance shall not be a valid warrant for infeftment after a certain date.

**561.** Instead of the destination in a charter or a disposition being to the disponee simply, or to the disponee and his heirs and assignees, it may be to the disponee and a special series of heirs, *e.g.* his heirs-male, or to the disponee, whom failing, to another, or to one person in liferent and another in fee. When there is such a destination, and the disponee dies intestate, the lands pass to the substitute, who may or may not be the heir-at-law in heritage of the disponee. Whatever the destination is, the lands do not, in the absence of a clause of return,<sup>1</sup> revert to the disposer. Should the destination, for instance, be to the disponee and his heirs-male, and the disponee die without having disposed of the lands and without leaving an heir-male, his nearest heir in heritage will succeed. The Crown, as *ultimus hæres*, takes the lands only on the failure of the heir specially called and of an heir in one of the three lines of succession—descending, collateral, and ascending.<sup>2</sup> It is the practice to close the words of conveyance with the words “heritably and irredeemably”; but the words are unnecessary.

### (iii) *Description.*

**562.** After the destination comes the description of the property. “There is no invariable rule,” says Menzies,<sup>3</sup> “as to the manner in which the lands must be described. Only this is indispensable, that means be furnished for ascertaining with certainty the lands or other subjects conveyed.”<sup>4</sup> Erskine remarks of the dispositive clause: “Here the grantee must be described by his name and designation; and also the particular subject disposed by its special boundaries or march-stones, or by its situation or other characters, so that it may be distinguished from all others; for the conveyance of an uncertain subject is inept and ineffectual.”<sup>5</sup> Thus a disposition of the granter’s (undefined) “right and interest” in specified property will not warrant infeftment.<sup>6</sup> “The great point,” says Professor Montgomerie Bell, in speaking of descriptions, “is to secure that the description shall embrace everything intended to be disposed; that it shall not contain anything not intended to be disposed; and that the subjects disposed shall be capable of clear and absolute identification.”<sup>7</sup>

**563.** There are two different, but in the end equally effectual, ways of describing the property, viz. (1) a description which itself identifies or affords means of identification, or (2) almost any words, not actually inconsistent with what is claimed, which prescriptive possession shews to be descriptive of the property in question.

<sup>1</sup> Ersk. iii. 10, 1.

<sup>2</sup> Bell, Prin., s. 1669.

<sup>3</sup> Menzies, 541.

<sup>4</sup> See *Smith v. Wallace*, 1869, 8 M. 204; *Wallace v. Dalrymple*, 1742, Mor. 6919; *Belches and Murray v. Stewart*, 21st January 1815, F.C.

<sup>5</sup> Ersk. ii. 3, 23.

<sup>6</sup> *Hay v. Aberdeen Mags.*, 1909 S.C. 554.

<sup>7</sup> Bell, Conv. i. 588.



**564.** Descriptions proper may be divided into six classes: (1) general descriptions; (2) particular descriptions; (3) descriptions by statutory reference; (4) descriptions by general name, in terms of s. 13 of the Titles to Land Consolidation Act, 1868; (5) descriptions in general terms; and (6) descriptions by reference, not in statutory form.

**565.** General descriptions consist simply of the name of the lands, without any specification of measurement or boundaries.<sup>1</sup> They are appropriate to the conveyances of old estates which have not been subdivided,<sup>1</sup> or of lands which have been erected into a barony.<sup>2</sup> On the principle that the conveyance of a barony comprehends every component part of it, whether specified or not, it was held that an infeftment in the barony of Lochow comprehended, as a part of it, a burgh of barony without its being specified.<sup>3</sup>

**566.** Particular descriptions define the lands often by boundaries, not infrequently by measurement and boundaries, with or without reference to a plan. The parish and the county in which the lands lie are invariably stated. Often there is a general description, followed by an enumeration of particulars. Where the description was of "the whole mains," containing, according to the dispositive clause, certain lands possessed by persons named, it was held that the conveyance carried only the lands which were possessed by the persons named, and not two other subdivisions of the lands, although they were known as part of the mains.<sup>4</sup> In referring to the case of *Murray*, and to the danger of a general description with an enumeration of particulars, Professor Menzies observes: "When it may be necessary from any circumstance, therefore, to give the particulars, the enumeration ought to be guarded by such words as leave the conveyance still to depend upon the general description—as, for instance, *or of whatever other or additional parcels the said lands of A. may consist*,"<sup>5</sup> or "including, but without prejudice to the said generality, the following separate possessions or holdings, viz."

**567.** It is not uncommon to describe the property "as possessed by" the disposer, or by the disponee; the latter being common on the sale of a farm to the tenant. The words may be dangerous, or at least objectionable, in certain circumstances, though they are not necessarily taxative.<sup>6</sup> In the case of a farm it is only in a limited or restricted sense that the tenant possesses the land, for generally the minerals are expressly, or at least impliedly, reserved from the lease; and—perhaps more important—the plantations and sporting rights are not possessed as parts of, or as rights incident to, his holding. Almost invariably the

<sup>1</sup> Menzies, 541.

<sup>2</sup> *Ibid.*; Bell, Conv. i. 589.

<sup>3</sup> *Earl of Argyle v. Campbell*, 1668, Mor. 9631.

<sup>4</sup> *Murray v. Oliphant*, 1634, Mor. 2262; and see *Mansfield v. Walker's Trs.*, 1833, 11 S. 813; *affd.* 1835, 1 S. & M'L. 203.

<sup>5</sup> Menzies, 542; and see Bell, Conv. i. 594.

<sup>6</sup> *Murray, supra*; *Gardner & Scott*, 1839, 2 D. 185; *revd.* 1843, 2 Bell's App. 129; *Orr v. Mitchell*, 1893, 20 R. (H.L.) 27 (minerals); *Caledonian Rly. Co. v. Jamieson*, 1899, 2 F. 100 ("occupied" by railway).

farm is part of an estate, and therefore this is really a new description, and a plan is convenient. If, on the other hand, it is the seller's whole property, the case is simple.

**568.** Description by reference in statutory form was first introduced by the Titles to Land Act, 1858. By s. 15 of that Act (which applied only to subjects held feu or blench) it was enacted that where lands had been particularly described in any prior conveyance or other writ recorded in the appropriate register of sasines, it should not be necessary, in any subsequent conveyance or writ containing or referring to the whole or any part of such lands, to repeat the particular description of the lands at length, but that it should be sufficient to specify the leading name or names, or other short distinctive description of the lands conveyed; and the name of the county; and the parish or supposed parish in which the lands lay; and to refer to the particular description contained in the prior conveyance or other writ so recorded, in the manner set forth in Schedule (L), No. 1, of the Act. Section 15 of the Act of 1858 was repealed by s. 34 of the Titles to Land Act, 1860, which made it sufficient in describing lands already particularly described in a conveyance, etc., recorded in the appropriate register of sasines (1) to specify the name of the county, and, where the lands were held burgage, the name of the burgh and county, in which they were situated; and (2) to refer to the particular description contained in the prior conveyance, etc., so recorded in the manner set forth in Schedule (H), No. 1, of the Act. Both the 1858 and 1860 Acts were repealed by the Consolidation Act, 1868, and s. 11 of the Act of 1868 enacted that, in all cases where any lands had been particularly described in any prior conveyance or deed of or relating thereto, recorded in the appropriate register of sasines, it should not be necessary in any subsequent conveyance or deed conveying or referring to the whole or any part of such lands, to repeat the particular description of the lands, but that it should be sufficient to specify some leading name or names or some distinctive description of the lands, as contained in the titles thereto; and the name of the county, and, where the lands were held by burgage tenure or by any similar tenure, the name of the burgh and county in which they were situated; and to refer to the particular description of such lands as contained in such prior conveyance or deed so recorded, in or as nearly as might be in the form set forth in Schedule (E) of the Act.

**569.** Sec. 11 of the 1868 Act was repealed by s. 61 of the 1874 Act, which prescribed a new form of reference in Schedule O to that Act. That schedule has in turn been repealed by s. 8 of the Conveyancing Act, 1924, and Schedule D (and notes) to that Act takes its place. As the law now stands after these successive changes, the essentials in a statutory description by reference are:

- (1) Specification of the county, and, where the lands were formerly held by burgage or by booking, specification of the burgh and county.
- (2) Reference to a particular description of the lands, as contained

in any conveyance, deed, or instrument of or relating thereto, the writ containing the particular description being identified, and there being specified the register of sasines in which it is recorded, and the date of recording.

**570.** In identifying the deed referred to, both granter and grantee or other parties to the deed are to be named but their designations are unnecessary. If there are several granters or grantees, it is enough to say "A. and others." If they are trustees, it is enough to say "the trustees of A." without naming the trustees and without designing the truster.<sup>1</sup> On the strict terms of Schedule D to the 1924 Act it appears unnecessary to state the date of the deed referred to, but no doubt the practice of giving the date will be continued, especially in view of the examples in that schedule. If there are two or more dates they may be given as "the            day of            19    and subsequent date" or dates.<sup>2</sup> If it is feared that there may be confusion between the deed referred to and another deed recorded in the same register on the same date, it is suggested<sup>3</sup> that the register volume in which the deed is recorded, and the page on which the record begins, may be stated, and it is specially enacted that errors in doing so may be excused. In point of fact that practical method of identification had on occasion been resorted to in proper cases long before the passing of the 1924 Act. On the other hand, many practitioners make a rule, wherever possible, of seeing that confusion from identity of date of recording is avoided, for instance in the case of a group of notices of title in favour of the same trustees, by securing that only one of the group shall be given in to be recorded on one day.

**571.** By s. 8 (1) of the 1924 Act it is retrospectively declared that it is no objection to deed No. 3, which is perilled on a description by reference to deed No. 2, that when deed No. 2 is examined it in turn is found to contain (a) a particular description of the property conveyed by deed No. 3, and (b) a reference to deed No. 1 for a description of "a larger piece of land of which the land particularly described" in deed No. 2 forms part.

**572.** Many practitioners will prefer that all dispositions on sale should contain some short identifying description in addition to the description by reference. This feeling is recognised in Note 2 to Schedule D to the 1924 Act, and the examples there given of short descriptions are properly of the very briefest, e.g. "that dwelling-house No. 10 Rosebery Crescent, Edinburgh." Some may, however, prefer to say "the house and premises 10 Rosebery Crescent in the city and county of Edinburgh." Care will be taken that no possibility of doubt is allowed to enter by the terms of any such short description. In many cases it is desirable and sufficient, after some few particular words of description, to say "and other subjects." It is to be kept in view that short popular identifying descriptions of the nature here indicated, and indicated in

<sup>1</sup> 1924 Act, Sched. D, Note I.

<sup>2</sup> *Ibid.*, s. 8 (4).

<sup>3</sup> *Ibid.*, s. 8 (3).



Note 2 to Schedule D to the 1924 Act, amount to a sufficient description of their own force, and without any aid from the following reference description, so that no flaw in the reference could be important. For instance, in the case of *Murray's Tr.*<sup>1</sup> the description in a bond granted by Murray was: "All and Whole that piece of ground fronting Baker Street of Aberdeen, in the burgh and county of Aberdeen, being the subjects and others particularly described in the feu-charter thereof granted by Basil John Fisher, residing now or lately in Aberdeen," and certain other persons named and designed, "in my favour, dated the 6th and 7th, and recorded in the division of the General Register of Sasines applicable to the county of Aberdeen on the           , all days of November 1882." On Murray's estates being sequestrated, the trustee pleaded that the bond was invalid as a heritable security in respect: (1) that, on account of the omission of the date of recording of the feu-charter, the description by reference was invalid; and (2) that, apart from description by reference, the subjects were not identified. Both the Lord Ordinary and the First Division rejected the first of these contentions, holding that the omission of the day of the month on which the prior deed was recorded did not invalidate the subsequent deed. The second contention, with which the First Division did not deal, was also rejected by the Lord Ordinary. Assuming that he might have taken too liberal a view of the requirements of the Act as to description by reference, he was of opinion that the trustee's second contention was wrong; and, in holding that there could be no doubt about the identity of the property over which the bond was granted, he said: "In the first place, the subjects are described as Murray's property in Baker Street, Aberdeen, and it is not said that Murray had any property in that street except one. In the second place, it is not Murray's property in Baker Street, but the property conveyed to him by certain persons fully designed by a certain deed fully described. I think these things, which appear *ex facie* of the bond, are quite sufficient to identify the subject of the security." In a later case<sup>2</sup> a bond bore to dispone "the subjects and others described in the disposition" granted by an identified person in favour of the granter of the bond, "dated the *twenty-seventh September* and recorded the *twelfth* day of *November* 1880." The bond bore to have been signed on 5th October 1880, and that the words quoted in italics had been written on erasure before it was signed. Considering that that statement was manifestly false as to the words on erasure, the Court held that these words must be deemed *pro non scripto*, but that, as the description was otherwise sufficient, the bond was valid.

**573.** Repealing and re-enacting, with verbal alterations, section 16 of the Titles to Land Act, 1858, section 13 of the Consolidation Act, 1868, provides that, where several lands are comprehended in one conveyance in favour of the same person or persons, it shall be competent to insert a clause in the conveyance declaring that the whole lands

<sup>1</sup> 1887, 14 R. 856.

<sup>2</sup> *Cattanach's Tr. v. Jamieson*, 1884, 11 R. 972.



conveyed and therein particularly described shall be designed and known in future by one general name to be therein specified; and that on the conveyance containing the clause, whether dated before or after the commencement of the Act, or on an instrument following thereon, whether dated before or after the commencement of the Act, and containing the particular description and clause, being recorded in the appropriate register of sasines, it shall be competent in all subsequent conveyances, and deeds, and discharges, of or relating to the several lands, to use the specified general name as the name of the several lands declared by the clause to be comprehended under it. These subsequent deeds are then as effectual as if they contained a particular description of each of the several lands, exactly as set forth in the recorded conveyance or instrument; provided that reference be made in the terms set forth in Schedule (G) to the Act, in the subsequent conveyance, etc., to a duly recorded conveyance or instrument in which the particular description and clause are contained.

574. When this method of statutory general name is to be followed there must thus be first a deed conveying two or more properties or parts of property to the same grantee or grantees, with particular descriptions, which, however, may be quite brief, and containing a declaration that the whole shall in future be known by one specified general name which may have been the name of one of the parts or may be entirely new, and that deed must be recorded. Then, secondly, in subsequent conveyances there will be inserted (1) the general name, (2) the county or burgh and county, (3) a reference to deed No. 1, as containing the particular descriptions, and (4) a statement that that deed prescribed the general name. Unfortunately this method has not been greatly used. It is to be noticed that strictly it is superfluous; for the specification of the county or burgh and county, and the reference to the prior recorded deed as containing the particular descriptions, would amount to a description by statutory reference, without any "name" at all.

575. By a description in general terms (not a description by general name) is meant such a description as either of the following: "All and Whole the lands, wherever situated," belonging to the disponent; or "All and Whole the lands situated" in a certain parish or county, belonging to the disponent. A description of this nature is seldom if ever found either in a feu-charter or in an ordinary *inter vivos* disposition. Deeds of this kind can be used only as mid-couples in making up a feudal title, and do not authorise *de plano* infettment.<sup>1</sup>

576. Lands may be described in a conveyance as the lands contained in a certain deed which, while sufficiently identified, is not identified in accordance with the enactments regarding descriptions by reference<sup>2</sup> or could not be so identified because it has not been recorded, or

<sup>1</sup> *Belches and Murray v. Stewart*, 21st January 1815, F.C.; *Graham's Crs. v. Hyslop*, 1753, Mor. 49.

<sup>2</sup> See Bell, Conv. i. 589.

because it is a deed which could not be recorded. These are cases of common-law descriptions by reference. The matter of description by reference is so constantly thought of and discussed under reference to modern statutes, that something like a serious practical misunderstanding is produced. It is extremely important therefore to be reminded by Lord M'Laren<sup>1</sup> that "Apart from the modern conveyancing statutes . . . I see no reason for doubting that a reference to an earlier deed as containing a full description . . . was a perfectly legitimate mode at common law of eking out a generalised or incomplete description. . . . In practice it was not infrequent." Having regard to the extremely expansive views indicated in, and which may be deduced from, the cases of *Wood*<sup>2</sup> and *Matheson*<sup>1</sup> without any support from statute, this opinion and practice are not surprising. The result of those two cases taken together, or at least of the opinions of Lords Trayner and M'Laren, would appear to be that "a property in Princes Street, Edinburgh" might be held sufficient as a particular description without anything more, assuming it not to be alleged that the granter had two properties in that street. The practical importance is in the case of an intended, but blundered, statutory reference, *e.g.* where the county is omitted; the title should then be quite good on the ground of a common-law reference even if the deed does not also contain what may pass as a particular description. Lord M'Laren spoke of "eking out," but it may go further than that.<sup>3</sup> There may even, it appears, be a good title by reference only to a separate plan, but then the loss of the plan (unrecorded) is fatal.<sup>4</sup>

577. The description in a feu-charter or disposition may constitute a *bounding charter* or *bounding title*—in other words, descriptions are, as regards the limit of the grant, either bounding wholly or partially, or not bounding. The peculiarity of a bounding charter is that no amount of possession under it, even for more than the prescriptive period, of a corporeal subject beyond its limits can enable the possessor to vindicate the ownership thereof.<sup>5</sup> But although the rule of law is that a person possessing under a bounding title cannot by prescription acquire the ownership of a corporeal subject lying beyond the limits of his title, he may yet, in virtue of his title and prescriptive possession thereon, acquire a right of servitude<sup>6</sup> or other incorporeal rights, such as salmon-fishings,<sup>7</sup> beyond his express boundaries. On the other hand, a proprietor, if he is not excluded by his own boundaries, can acquire by prescription lands which lie within the boundaries of another proprietor as part and pertinent of his own lands, because he

<sup>1</sup> *Matheson v. Gemmell*, 1903, 5 F. 448; cf. *Cattanach's Tr. v. Jamieson*, 1884, 11 R. 972.

<sup>2</sup> *Murray's Tr. v. Wood*, 1887, 14 R. 856.

<sup>3</sup> Bell, Conv. i. 589.

<sup>4</sup> *MacLachlan v. Bowie*, 1887, 25 S.L.R. 734.

<sup>5</sup> See, *e.g.*, *North British Rly. Co. v. Moon's Trs.*, 1879, 6 R. 640; *Reid v. M'Coll*, 1879, 7 R. 84.

<sup>6</sup> *Beaumont v. Lord Glenlyon*, 1843, 5 D. 1337.

<sup>7</sup> *Earl of Zetland v. Tennent's Trs.*, 1873, 11 M. 469; and see *Earl of Dalhousie v. M'Inroy*, 1865, 3 M. 1168.

cannot be limited by the boundaries of another.<sup>1</sup> See BOUNDARIES AND FENCES.

(iv) *Effect of Conveyance.*

578. It is not necessary that in a description every particular of the property should be mentioned, and it may even be undesirable and dangerous that that should be attempted. Subject to any contractual terms, a purchaser is not entitled to a description of that nature, nor to a description by plan.<sup>2</sup> In the ordinary case a purchaser is entitled to the description in the existing title, and to warrandice of that.<sup>3</sup> But if a question arises, the first thing is what is the exact subject sold; and if the seller can shew that "he has kept back from the sale a certain portion of the land so possessed" under the existing title, or "if there is any reasonable ground for question as to the fact," i.e. whether the existing description is not wider than the contract, "he is clearly entitled to frame a new description in order to convey to his purchaser the subject sold and nothing more."<sup>3</sup> On the rule of appealing to the contract, it is submitted that, if it contains or imports, as from an advertisement, a particular description, and the existing title is general, the purchaser is entitled to the particular description in lieu of, or incorporated with, the existing description; again subject to any contrary stipulation in the contract. In like manner it may be that the seller would be entitled to have the new description (and his warrandice) limited to the description in the contract.

579. If the title tendered to something which is admittedly part of the subject of sale is as part and pertinent (perhaps discontinuous), expressed or implied (for the distinction between these two, see Lord Johnston in the *Dunstaffnage* case),<sup>4</sup> it is thought that the purchaser is entitled to have that part of the property elevated to the position of a distinct parcel, or at any rate to have words added which will identify it and expressly convey it.<sup>5</sup> This last matter of part and pertinent is made very clear if it be assumed either that the part of the common title which rests on part and pertinent is the only part which is being sold, or that the whole is being sold except that part. In the former case there must clearly be a new description. The latter case is rather more troublesome, and, in order to leave the seller with a satisfactory express infestment in his reserved part, the suggestion is made that he should first execute in his own favour a disposition of the whole with a specific description of the pertinent as a separate parcel, and then convey to the purchaser the rest, but not that parcel. There may be other cases, namely, when, of the express lands in the existing title, part is being sold and part retained, or when the whole is being sold but in parts to two or more purchasers, and in any of

<sup>1</sup> Stair, ii. 3, 73; Ersk. ii. 6, 3; *Earl of Fife's Trs. v. Cumming*, 1830, 8 S. 326.

<sup>2</sup> *Johnston's Trs. v. Kinloch*, 1925, S.L.T. 124.

<sup>3</sup> *Houldsworth v. Gordon Cumming*, 1910 S.C. (H.L.) 49.

<sup>4</sup> *Duke of Argyll v. Campbell*, 1912 S.C. 458, at p. 491.

<sup>5</sup> Cf. *Duke of Argyll v. Campbell*, *supra*.



those cases the "part and pertinent" may be going wholly to one of the parties, or it may be split up among two or more of them. Once the main or express lands are severed, an apparently insoluble question arises regarding the ownership of the part and pertinent, unless that is expressly dealt with, which would require a new description or new descriptions.

**580.** There may have been such changes that the existing description in the title is no longer true. To take very simple illustrations, what is described in the title as a two-storey house may now be a four-storey building, or a self-contained house may have been converted into two shops and flats above. These things will usually appear from the contract; but whether this is so or not, the title must be corrected up to date. When a new description is introduced, or if material changes are made, so that the identity is not apparent, the new should be connected with the old; but on no account, in that case, should the old description be given in any form other than a bare reference; thus:

All and Whole (*insert modernised description, mentioning the county*), which subjects hereby disposed are the subjects otherwise described in the disposition granted by A. in my favour dated                      and recorded                      .

**581.** If a purchaser is bound under contract to accept a disposition with a description which is not altogether satisfactory,<sup>1</sup> it may be for consideration whether he should not take it in favour of a nominee, and then obtain from the latter a disposition in the improved form desired, which may have important effects in relation to prescription.

**582.** It has next to be shewn what estate passes to the disponee under a feu-charter or a disposition. The disponee gets not only the *solum*, but also all "that forms a proper part of the land, from the sky to the centre."<sup>2</sup> "So long," it has been said, "as the element of prescription is left out of account, and there is no dispute as to the identity of the subject, nor any express limitation in the grant, the title of the land is held as including everything *a cælo ad centrum*, within the boundaries as drawn on the surface, and the direction of the plumb line let fall therefrom, and produced indefinitely upwards and downwards."<sup>3</sup> It is customary to insert, after the description of the lands, the words "with the parts and pertinents of the said subjects," but these words are unnecessary, as they carry nothing beyond what would be carried though they were omitted. The rule about parts and pertinents has been stated in these words by L. J.-C. Hope: "A grant of the lands of A. is as extensive as a grant of the lands of A. with parts and pertinents; for the question, as Erskine says, is, what lands fall under that designation of A. as known in the country, and by what limits these lands are circumscribed?"<sup>4</sup> Thus, if lands

<sup>1</sup> *Gardner v. Scott*, 1839, 2 Bell's App. 129; *Orr v. Mitchell*, 1893, 20 R. (H.L.) 27, at p. 31.

<sup>2</sup> Bell, Prin., s. 737.

<sup>3</sup> Rankine on Land-Ownership, 4th ed. 181.

<sup>4</sup> *Gordon v. Grant*, 1850, 13 D. 1, at p. 2.



are disposed, the donee gets the building, for *inædificatum solo cedit solo*,<sup>1</sup> and the fixtures connected with the lands or the buildings, which are deemed *partes soli* by being annexed, actually or constructively, to the soil.

**583.** The *regalia*,<sup>2</sup> however, do not pass as part and pertinent of lands under a Crown grant. The *regalia majora*, which include the Sovereign's right of superiority, cannot be communicated to a subject. The *regalia minora* include, *inter alia*, the narrow seas, navigable rivers, highways, foreshores, salmon-fishings, mussels and oysters, ports and harbours, ferries, treasure-trove, and wrecks, and they, with the exception of navigable rivers and highways, can be acquired by express grant from the Crown or by prescription on a *habile* title.<sup>3</sup> Professor George Joseph Bell says when speaking of the *regalia minora*: "*Regalia* are excepted from the ordinary rule of pertinents, and even when granted by the Crown to a vassal they are not held to be transferred from that vassal by a conveyance of the land unless expressly mentioned";<sup>4</sup> at least, it may be said, unless the vassal clearly shews an intention to convey them.<sup>5</sup>

**584.** After the description of the lands the disponent in a feu-charter usually adds the words, "together with my whole right, title, and interest in the *dominium utile* of the said subjects," and the disponent in a disposition usually adds the words, "together with my whole right, title, and interest, present and future, therein." Although the words appropriate to a disposition were used in a feu-charter, they would convey only right, title, and interest consistent with the grant of a feu.<sup>6</sup> Either form of words is, however, unnecessary in an onerous conveyance with absolute warrandice, express or implied, as such a conveyance embraces subordinate or supervening rights, although not specially mentioned: but in gratuitous conveyances, without express absolute warrandice, the words ought to be used when the disponent desires to convey subordinate or supervening rights.<sup>7</sup>

#### (v) *Reservations and Conditions Generally.*

**585.** The appropriate place for reservations or conditions in favour of the parties under a feu-charter or a disposition is the end of (*i.e.* still in <sup>8</sup>) the dispositive clause. Among these reservations or conditions are to be found in practice a reservation of mines and minerals, a clause of irritancy *ob non solutum canonem*, provision for allocation of feu-duty, stipulations as to the erection of buildings, etc. In a feu-right as in

<sup>1</sup> *Rose v. Ramsay*, 1777, Mor. 9645; *Downie v. Wallace*, 1777, Mor. App. "Implied Assig." 1, 16; Ersk. ii. 6, 4-5; Bell, Prin., s. 743.

<sup>2</sup> Ersk. ii. 6, 13; Bell, Prin., ss. 669 *et seq.*, 737, 740, 748, 750; Bell, Conv. i. 606

<sup>3</sup> Bell, Conv. i. 606.

<sup>4</sup> Bell, Prin., s. 748.

<sup>5</sup> *Lord Advocate v. McCulloch*, 1874, 2 R. 27; *Earl of Breadalbane v. Jamieson*, 1875, 2 R. 826.

<sup>6</sup> Bell, Conv. i. 608.

<sup>7</sup> *Love v. Storie*, 1863, 2 M. 22; Bell, Conv. i. 608.

<sup>8</sup> Bell, Prin., s. 920; *Cowie v. Muirden*, 1893, 20 R. (H.L.) 81, per Lord Shand.

other deeds there may be obligations which are unenforceable. Thus a superior bound himself to give the feuar, in addition to the feu, "a patch of arable or improved land at an adequate rent"; this was held unenforceable.<sup>1</sup> An obligation to erect buildings before a date which has expired at the delivery of the charter (nothing having then been built) is an impossible or non-sensible condition and will not be made the basis of an irritancy as it stands.<sup>2</sup>

(vi) *Minerals.*

**586.** An important reservation, often made by a disponent, is that of mines and minerals. An initial question is whether, on a contract for a feu, which is silent as to minerals, a position may be created in which the granter will be barred from insisting on a reservation of minerals being included in the charter, or, on the other hand, the feuar will be barred from objecting to the insertion of the reservation. Obviously that position ought never to be allowed to arise, for the missives ought to be explicit. The superior may prevail though there is no express mention of minerals in the missives, much depending on the local conditions and the knowledge possessed by, or which may be imputed to, the feuar.<sup>3</sup> Thus in a mineral district, or perhaps anywhere, an acceptance, in the missives of a feu from the estate of X., of "the usual clauses inserted in feus from the estate" will probably bind the feuar to allow a reservation of minerals if that is in fact a "usual clause" in the estate feus;<sup>4</sup> certainly if the reservation is mentioned in the missives, the reference to usual clauses will commit the feuar to a clause negating any claim by him for surface damage, if that is a usual clause on the estate.<sup>4</sup>

**587.** Care should be taken to see that the minerals which are chiefly in view are specially mentioned, and that the things specially mentioned are not so mentioned as to detract from the force of the general words used. As regards the general words "mines and minerals," they "are not definite terms; they are susceptible of limitation or expansion, according to the intention with which they are used"; and to determine that, "regard must be had not only to the words employed to describe the things reserved, but to the relative position of the parties interested and to the substance of the transaction."<sup>5</sup> Lord Dunedin<sup>6</sup> extracted from the cases the following rule: Whether a substance is to be deemed a mineral is a question of fact in the circumstances of each case; having regard to the vernacular of the mining and commercial world and land-owners at the time when the clause was framed, yet not so as to let an

<sup>1</sup> *Lord Clinton v. Brown*, 1874, 1 R. 1137.

<sup>2</sup> *Mags. of Glasgow v. Hay*, 1883, 10 R. 635.

<sup>3</sup> *Todd v. M'Carrol*, 1917, 2 S.L.T. 127; *Gall v. Gall*, 1918, 1 S.L.T. 261.

<sup>4</sup> *Alexander v. Ormiston*, 1895, 3 S.L.T. 139.

<sup>5</sup> Lord Watson in *Mags. of Glasgow v. Farie*, 1888, 15 R. (H.L.) 94.

<sup>6</sup> *Caledonian Rly. Co. v. Glenboig Union Fireclay Co.*, 1910 S.C. 951; 1911 S.C. (H.L.) 72.

exception swallow up the grant, as by excepting a substance which, in the given case, forms the ordinary subsoil.

**588.** The whole subject has been in recent years fully discussed in the House of Lords, and the leading cases are noted below.<sup>1</sup> On the question whether particular substances may rank as minerals the cases are numerous and go far back; they are marshalled by the Lord Chancellor in the *Budhill* case<sup>1</sup> and in more detail in MacSwinney on Mines, 5th ed., 369–70. Mr MacSwinney regards the earlier cases as not now of much weight, but that was not the view of the Lord Chancellor in *Budhill*. Great caution is, however, necessary in applying the decisions, for the whole matter is one of circumstances and degree, and the same substance may be held to be a mineral in one setting, and not in another. It is obvious that that may or must be so, for the ordinary subsoil is not to be held to be reserved, and that may consist of one thing in one place and of another thing in another place. See MINES AND MINERALS.

**589.** The clause of reservation of minerals ought to take the form of a reservation of the substances themselves; but a reservation of power to work has, in certain circumstances, been held to have the same exclusive effect.<sup>2</sup> To the reservation of the substances there ought to be added express powers to work, and an express agreement as to compensation or no compensation. In the absence of express clauses there is a conflict between two rights and interests, represented by the maxims *cuicunque aliquid conceditur*, etc., and *sic utere tuo ut alienum non lædas*, the former importing that the reserved estate in the minerals carries with it all powers required to make the reservation fully effective, and the latter importing that the surface owner is entitled to support. Apart from very modern legislation mentioned below, in the absence of express agreement the mineral owner is not entitled to break or use the surface. But he is entitled to work the minerals, saving support, and even the right to support may be inferred to be surrendered, e.g. if “longwall” working is sanctioned expressly or by implication.<sup>3</sup> See SUPPORT. The clause ought to be express one way or the other on the subject of breaking the surface by pits or otherwise.<sup>4</sup>

**590.** Compensation, if not negatived, is an implied right of the surface owner. An express clause will usually exclude the common law liability.<sup>5</sup> The implied liability is not limited to buildings existing at the date of the severance of the surface and mineral estates,<sup>6</sup> but on the other hand a clause limited to “buildings existing thereon at the date hereof” does not cover even substituted buildings.<sup>5</sup> A contract exclud-

<sup>1</sup> *Caledonian Rly. Co. v. Glenboig Union Fireclay Co.*, *supra*; *North British Rly. Co. v. Budhill Coal Co.*, 1910 S.C. (H.L.) 1; *Great Western Rly. Co. v. Carpalla Co.*, [1910] A.C. 83; *Caledonian Rly. Co. v. Symington*, 1912 S.C. (H.L.) 9.

<sup>2</sup> *Duke of Hamilton v. Dunlop*, 1885, 12 R. (H.L.) 65.

<sup>3</sup> *Anderson v. M'Cracken Bros.*, 1900, 2 F. 780.

<sup>4</sup> *Ramsay v. Blair*, 1876, 1 App. Cas. 701; 3 R. (H.L.) 41; *Macdonald v. Welsh*, 1896, 23 R. 995.

<sup>5</sup> *Barr v. Baird & Co.*, 1904, 6 F. 524.

<sup>6</sup> *Neill's Trs. v. Dixon, Ltd.*, 1880, 7 R. 741; *Dryburgh v. Fife Coal Co.*, 1905, 7 F. 1083.



ing compensation is valid.<sup>1</sup> The right to enforce the implied liability for compensation runs with the lands, and apparently so does an express clause<sup>1</sup>; it is so in England. But it is to be remembered that the claim is on account of subsidence of the surface, not excavation of the minerals. There may be repeated actions, but only one for each subsidence.<sup>2</sup> The surface owner cannot claim for subsidence which happened before his own title accrued, but in Scotland an express assignation of such a claim would be valid,<sup>3</sup> at least if accompanying the surface estate, though it may be otherwise in England.<sup>4</sup> Though the claim is for subsidence, it lies against the party or parties whose workings caused the subsidence, or those who authorised the workings, and much practical difficulty may arise in selecting the proper defender.<sup>5</sup>

**591.** By the Mines Act, 1923, the Railway and Canal Commission may cancel all restrictions on the working of minerals and may, in the face of restrictions, grant rights, *inter alia*, to let down the surface and to use the surface for shafts, way-leaves and workings. The parties to whom those rights may be given include direct liferenters and trustees. On the other hand, but only if expedient in the national interest, restrictions on the workings of minerals may be imposed when required for support of buildings, existing or intended, and those restrictions may extend to minerals under adjacent land. When restrictions are thus cancelled or imposed compensation may be awarded. See MINES AND MINERALS.

**592.** When a proprietor feus or sells lands under reservation of the minerals, or disposes of the minerals reserving the lands, the minerals are severed from the *dominium utile*, and can be disposed as a separate tenement by those in right of them.<sup>6</sup> When minerals are reserved by a superior, he holds them under the same title by which he holds his fee of superiority, and he can dispose them separately, or along with the superiority. Professor Montgomerie Bell lays down the rule that if a superior with such a right to the minerals "does not expressly retain them, they will be comprehended under a disposition of the superiority conceived in the usual and appropriate terms."<sup>7</sup> But the rule is too broadly laid down; for it must now be considered fixed that, whilst a disposition of the lands will include not only the surface but all the strata below it, the context may shew that the disposition of the superiority of the lands was not intended to include the minerals.

<sup>1</sup> *Buchanan v. Andrew*, 1873, 11 M. (H.L.) 13.

<sup>2</sup> *Duke of Abercorn v. Merry & Cuninghame*, 1908, 16 S.L.T. 211, and cases cited; 1909 S.C. 750.

<sup>3</sup> *Caledonian Rly. Co. v. Watt*, 1875, 2 R. 917.

<sup>4</sup> *MacSwinney on Mines*, p. 274.

<sup>5</sup> *Geddes' Trs. v. Haldane*, 1906, 14 S.L.T. 328.

<sup>6</sup> *Marchioness of Lothian's Trs. v. Simpson*, 1790, Mor. 2692; *affd.* 1792, 3 Pat. 238; *Dunlop's Trs. v. Corbet and Macnair*, 20th June 1809, F.C.; *Livingstone*, 1776, 5 Bro. Supp. 559; *Forbes' Trs. v. Livingston*, 31st January 1822, and 29th November 1827, F.C.; *Fleming v. Howden*, 1868, 6 M. 782; see also *Graham v. Duke of Hamilton*, 1869, 7 M. 976; *rev.* 1871, 9 M. (H.L.) 98; *Blair v. Ramsay*, 1875, 3 R. 25; *affd.* 1876, 3 R. (H.L.) 14; *Dunlop v. Duke of Hamilton*, 1884, 11 R. 963; *affd.* 1885, 12 R. (H.L.) 65.

<sup>7</sup> *Bell, Conv. i.* 611.



Thus in *Orr v. Moir's Trs.*<sup>1</sup> the Duke of Argyll feued the lands of Hillfoot, part of the estate of Castle Campbell, under reservation of the coals and coal-heughs. Thereafter one Tait acquired the estate of Castle Campbell, so far as remaining in the Duke. Tait having become bankrupt, his trustee in 1837, on the narrative that he had exposed to sale "the superiority and feu-duty of the lands" of Hillfoot, and that Moir, who had previously acquired the *dominium utile* of Hillfoot, had offered a certain sum for these subjects, disposed to him "All and Whole the town and lands of Hillfoot, . . . all as at present possessed" by Moir and his tenants. The feu-rights and infestments granted by the predecessors of Tait's trustee were excepted from the warrandice clause. When Moir obtained his disposition no coal had been worked in Hillfoot. In 1890, one Orr, who in 1860 acquired from Tait's trustee, *inter alia*, the lands of Castle Campbell, with a description which included the lands of Hillfoot, and the "coals and coal-heughs," raised an action against Moir's representatives to have it declared that the pursuer was proprietor of the coals in Hillfoot in virtue of his conveyance of 1860. Reversing the judgment of the Court of Session, the House of Lords held that Orr was entitled to decree of declarator. While recognising that a disposition of lands includes not only the surface but all the strata below it, and that the dispositive clause in the deed of 1837 might be read either as a conveyance of the whole lands of Hillfoot, or as a conveyance of the superiority thereof merely, they held that the superiority of the estate, but not the minerals, was conveyed by the disposition of 1837, because both the narrative of the deed and words of description in the dispositive clause itself showed that the superiority was alone conveyed.

(vii) *Prohibition of Subinfeudation.*

593. The Act 20 Geo. II. c. 50 abolished all clauses *de non alienando sine consensu superiorum*. This Act did not strike at the legality of conditions against subinfeudation, which are still valid if made before the commencement of the Conveyancing Act, 1874,<sup>2</sup> and invalid if made after that date.<sup>3</sup> But no prohibition of subinfeudation struck at an alternative holding.<sup>4</sup>

(viii) *Pre-emption by Superior.*

594. Neither of the Acts referred to in the immediately preceding paragraph, it is thought, has rendered illegal a clause of pre-emption in favour of the disposer of lands.<sup>5</sup> The clause of pre-emption varies

<sup>1</sup> 1892, 19 R. 700; *affd.* 1893, 20 R. (H.L.) 27; and *cp.* *Fleeming, supra.*

<sup>2</sup> *Campbell v. Dunn*, 1823, 2 S. 341; 1825, 1 W. & S. 690; 1828, 6 S. 679.

<sup>3</sup> 37 & 38 Vict. c. 94, s. 22.

<sup>4</sup> *Colquhoun v. Walker*, 1867, 5 M. 773; *Inglis v. Wilson*, 1909 S.C. 1393.

<sup>5</sup> *Preston v. Earl of Dundonald's Crs.*, 1805, Mor. App., "Personal and Real," No. 2; 3 Ross's L.C. 289; *Earl of Mar v. Ramsay*, 1838, 1 D. 116; Bell, Conv. i. 612; Menzies, 600; Bell, Prin., ss. 861, 865; Juridical Styles, i. 18.

in its terms, one form being an obligation imposed on a disponent, if he intends to sell the lands, to make the first offer to the disponent or his heirs and successors at the price at which he is prepared to sell to another. A clause of pre-emption, being unfavourable to liberty, will not cover alienations not falling strictly within its terms,<sup>1</sup> and to be effectual against singular successors it must appear on record<sup>2</sup> in the titles of the servient property.<sup>3</sup>

(ix) *Redemption by Superior.*

**595.** A right of redemption of the feu by the superior is entirely different from a right of pre-emption, for it entitles the superior to buy back the ground with all buildings on his own initiative though the vassal has no thought of selling. A clause of that kind is valid.<sup>4</sup> The price may be left to arbitration or may be fixed in advance in the charter.

(x) *Irritancy ob non solutum canonem.*

**596.** The irritancy *ob non solutum canonem*, or tinsel of the feu, is often classed among the casualties of superiority, but it is rather a remedy against non-payment of the feu-duties,<sup>5</sup> or "a contingent irritancy for enforcing payment of feu-duties."<sup>6</sup> This irritancy was introduced by the Act 1597, c. 250, which provides that if any vassal or feuar "failzie in making of payment of his few-dewty . . . be the space of twa zeires haill and togidder, they sall amitte and tine their said few of their saids lands, conforme to the civil and canon law, sicklike and in the same manner as gif ane clause irritant were specially ingrossed and insert in thar said infeftmentis of few-ferme." Notwithstanding this enactment, it is not uncommon to find in feu-charters a conventional irritancy *ob non sol. can.* In the case of *Maxwell's Trs. v. Bothwell School Board*<sup>7</sup> opinions were indicated to the effect that a vassal who had incurred an irritancy *ob non sol. can.* was entitled to purge it by payment of the arrears of feu-duty, without arrears of interest even at a stipulated rate. To enforce the irritancy, whether based on the Act 1597, c. 250, or on a conventional clause, it is necessary to bring an action of declarator.<sup>8</sup> Prior to the Conveyancing Amendment Act, 1887,<sup>9</sup> the irritancy, even when conventional, could be purged by paying the arrears of feu-duty and expenses at any time before the decree of declarator *ob non sol. can.* was extracted, but not later.<sup>10</sup> By s. 4 of the Act of 1887, however, it is enacted that:

"No decree of declarator of irritancy at the instance of a superior against his vassal *ob non solutum canonem* obtained after

<sup>1</sup> *Earl of Mar, supra*; and *Lumsden v. Stewart*, 1843, 5 D. 501.

<sup>2</sup> *Gull v. Mitchell*, 1729, Mor. 10306.

<sup>3</sup> *M'Lean v. Kennaway*, 1904, 12 S.L.T. 117.

<sup>4</sup> *M'Elroy v. Duke of Argyll*, 1902, 4 F. 885.

<sup>5</sup> Bell, Prin., s. 701.

<sup>6</sup> Bell, Conv. i. 625.

<sup>7</sup> 1893, 20 R. 958.

<sup>8</sup> *Lockhart v. Shiells*, 1770, 2 Ross's L.C. 244; Mor. 7244; Bell, Prin., s. 701, and authorities there cited.

<sup>9</sup> 50 & 51 Vict. c. 69.

<sup>10</sup> *Rait v. Spence*, 1848, 11 D. 126; *Ballenden v. Duke of Argyll*, 1792, Mor. 7252.

the passing of this Act shall be deemed to be final until an extract thereof shall have been recorded in the appropriate register of sasines.”

597. If a feu-right is irritated *ob non sol. can.*, whether in virtue of the Act 1597, c. 250, or of a conventional irritancy (unless in the latter case there are apt and sufficient words to create an exception), the superior cannot claim arrears of feu-duty,<sup>1</sup> but he takes the land free from all burdens imposed on it, and unaffected by any subfeu-right granted by the vassal<sup>2</sup> without his consent. In the case of *Cassels*, a majority of the whole Court held that a decree of declarator of irritancy *ob non sol. can.*, whether conventional or under the statute, annuls the vassal's right and all that has followed thereon, including the rights of subvassals, without inferring any obligation on the superior to recompense subvassals for buildings erected by them on their subfeus; and in the case of *Sandeman*, the House of Lords, reversing the Second Division, pronounced judgment to the same effect as in *Cassels*.

598. The feu-duty is a *debitum fundi* on the lands feued, and although a vassal may, unless effectually prohibited by a condition against subinfeudation made before the commencement of the Conveyancing Act, 1874 (s. 22), subfeu the whole or part of his lands, every part of the lands remains, notwithstanding any subfeu, burdened with the whole of the feu-duty. The vassal may, however, arrange with the superior to insert in the feu-right to be granted in his favour a clause by which the superior assents to a proportion of the *cumulo* feu-duty being allocated on each part of the lands in the event of the vassal's subfeuing or otherwise disposing his lands in separate parcels. See SUPERIOR AND VASSAL.

#### (xi) *Building Conditions.*

599. In a feu-charter, feu-contract, or disposition there are very often conditions, positive or negative, regarding buildings on the lands disposed. These conditions may have as their object the giving of security for payment of the feu-duty, or the preservation of amenity. For example, there may be an obligation on the disponent to erect within a certain time buildings capable of yielding a certain rental, or to build houses of a certain value and to maintain them when built, or to build according to a plan, or not to build tenements or not to carry on any operation which is a nuisance.<sup>3</sup> In relation to such matters the principle is that, apart from questions of servitude, a vassal's absolute right of property can be qualified only by restrictions contained in his feu-charter<sup>4</sup> and (in the case of singular successors) duly

<sup>1</sup> *Mags. of Edinburgh v. Horsburgh*, 1834, 12 S. 593; *M'Vicar v. Cochran & Ker*, 1748, Mor. 15095.

<sup>2</sup> *Cassels v. Lamb*, 1885, 12 R. 722; *Sandeman v. Scottish Property Investment Co.*, 1883, 10 R. 614; rev. 1885, 12 R. (H.L.) 67.

<sup>3</sup> Rankine on Land-Ownership, 4th ed., p. 464 *et seq.*, and cases there cited.

<sup>4</sup> *Shearer v. Peddie*, 1899, 1 F. 1201.

feudalised as conditions of a simultaneous infeftment in the burdened lands.<sup>1</sup> The subject is fully dealt with in the article on BUILDING RESTRICTIONS.

**600.** In feu-charters it is usual to find that the conditions, restrictions, or qualifications of the grant are declared real and preferable burdens. Sometimes the clause declaratory of these burdens is fenced by an irritant clause, and sometimes by both an irritant and a resolute clause. It has sometimes been said that a real burden must be intended, but it appears that that rule has no application to conditions and restrictions as between superior and vassal. "The real truth is that I do not think it ever matters whether a condition of a feu-right is declared to be a real burden or not, unless it is one of these matters where it does make a difference whether you can point the ground or not, because you can point the ground, of course, for a real burden, but you cannot point the ground for a mere condition."<sup>2</sup> Thus it may be impossible to create a real burden for an obligation to build, but successive vassals are bound by the obligation. The same holds as to any proper condition of tenure. But it is otherwise with obligations to pay the cost, or a share of the cost, of (a) buildings already erected, or (b) buildings or works to be erected or executed by the superior, at least in the case of a singular successor acquiring right after the completion of the buildings and works, even though his title is expressly subject to all the conditions of the charter.<sup>3</sup> In cases such as these there would require to be a specific sum and an express real burden. See BURDENS.

(xii) *Reference to Conditions.*

**601.** The Land Transference Act, 1847, provided for existing conditions of title being referred to as set out at length in a prior recorded deed. After a good deal of intervening legislation this facility was re-enacted by s. 10 of the Titles to Land Consolidation Act, 1868. That section is as follows:

"Where lands are, or shall hereafter be, held under any real burdens or conditions or provisions or limitations whatsoever appointed to be fully inserted in the investitures of such lands, it shall, notwithstanding such appointment, and notwithstanding any law or practice to the contrary, not be necessary in any conveyance or deed of or relating to such lands to insert such real burdens or conditions or provisions or limitations, provided the same shall, in such conveyance or deed, be specially referred to as set forth at full length in the conveyance or deed of or relating to such lands, recorded in the appropriate register of sasines, wherein the same were first inserted, or in any such conveyance or deed of subsequent date recorded as aforesaid, and forming part of the

<sup>1</sup> *Campbell's Trs. v. Mags. of Glasgow*, 1902, 4 F. 752.

<sup>2</sup> *Maguire v. Burges*, 1909 S.C. 1283, per Lord Dunedin.

<sup>3</sup> *Edinburgh Mags. v. Begg*, 1883, 11 R. 352.



progress of titles of the said lands, such reference being made in the terms, or as nearly as may be in the terms, set forth in Schedule (D) hereto annexed; and the reference to such real burdens or conditions or provisions or limitations, if so made in any such conveyance or deed, whether dated prior or subsequent to the commencement of this Act, shall be held to be equivalent to the full insertion thereof, and shall, to all intents and in all questions whatever, whether with the disponent or superior or third parties, have the same legal effect as if the same had been inserted exactly as they are expressed in the recorded conveyance or deed referred to, notwithstanding any law or practice or Act or Acts of Parliament to the contrary."

**602.** This matter of reference to existing conditions of title is one which has caused much trouble, but it is now lightened by s. 9 of the Conveyancing Act, 1924. These references are inserted for two different reasons, one being to comply with clauses of direction in the charter or other writ, for which reason the disponent (*i.e.* his agent) is anxious to have the reference inserted; the other is to make it plain that the property is disposed with certain burdens, for which reason the disponent is anxious to have the reference inserted. Of the latter an example is a memorandum creating additional feu-duty in lieu of casualties, etc., the reference to which may usually be safely omitted, and all the more so if that document is included in the inventory of deeds referred to *in gremio* of the deed, and signed as relative to it.

**603.** As regards the prior conditions, burdens, etc., three general observations may be made. In the first place, no special importance attaches to the insertion or omission of the reference unless the direction to refer has been reinforced by an irritant or resolute clause: if it has not, the omission of the reference is no defect in, or ground of objection to, the title. In the second place, it is unseemly to have a lengthy string of substantives repeated in each successive deed, and there can be no doubt that that is not necessary, though all those terms should be present in the directory clause in the charter or other prior writ: it is quite enough to say "burdens, conditions, and whole other clauses specified in." Finally, it has never been doubted that qualified references, which are very common, are sufficient compliance, *e.g.* "so far as valid and subsisting" or (if it be a partial conveyance) "so far as valid, subsisting, and applicable."

**604.** Sec. 9 of the 1924 Act contains important new rules on this matter, viz.: (1) No reference need be made in any security writ; and this provision is retrospective. (2) If at any time the then proprietor's recorded title contains the reference, that wipes out any omission to refer in the prior writs; and this also is retrospective. (3) If the proprietor's immediate title is defective he may at his own hand cure the defect by executing and recording a deed of acknowledgment, with a warrant of registration on his own behalf.

**605.** In 1874 a new idea was introduced on the subject of importing

feuing conditions. Previous legislation referred to in the preceding paragraphs had related only to allowing a reference to a prior recorded deed for existing conditions already affecting the property because created by previous deeds. But that still left it necessary that in each feu-charter there should be set out expressly and fully all the conditions the creation of which was part of the new bargain between the superior and the vassal. The new idea in 1874 was that the owner of a feuing estate might set up standard feuing conditions for that estate, reduce these to the form of a unilateral deed, record that deed in the appropriate register of sasines, and then in future charters create and import these conditions as new conditions of that particular feu by referring to the standard recorded deed.<sup>3</sup> This method has in practice been little used.

**606.** To ensure the insertion in the register of sasines of real burdens contained in an original grant of lands various methods can be adopted.

(1) The disposer may direct the burdens to be inserted in any notarial instrument or notice of title to follow on the charter, and to be inserted or validly referred to in all future deeds of transmission, decrees, instruments, or other writs of or relating to the subjects or any part thereof, and then follow this direction with a clause of irritancy declaring that otherwise all such deeds, decrees, and instruments shall be void and null.

(2) The direction to have the real burdens duly inserted on record may be followed not only by an irritant clause, but also by a resolute clause.

**607.** Another method of securing that the burdens and conditions shall be inserted in the infestment is to insert before the testing clause, whether of an original grant of land or a deed of transmission, a clause of direction to the effect that the part of the conveyance constituting the real burdens shall be recorded in the register of sasines in accordance with s. 12 of the Consolidation Act, 1868, which provides:

“Immediately before the testing clause of any conveyance of lands, it shall be competent to insert a clause of direction in, or as nearly as may be in, the form of No. 1 of Schedule (F) hereto annexed, specifying the part or parts of the conveyance which the granter thereof desires to be recorded in the register of sasines; and when such clause is so inserted in any conveyance, whether dated before or after the commencement of this Act, and with a warrant of registration thereon, in which express reference is made to such clause of direction (such warrant being in the form as nearly as may be of No. 2 of Schedule (F) hereto annexed), is presented to the keeper of the appropriate register of sasines for registration, such keeper shall record such part or parts only, together with the clause of direction and the testing clause and warrant of registration; and in the absence of such express reference in the warrant of registration as aforesaid, such conveyance shall be engrossed in the register as if it had contained no clause of direction; and the recording of such part or parts of the conveyance, together with the clause

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<sup>3</sup> 37 & 38 Vict. c. 94, s. 32.

of direction and the testing clause, and the warrant of registration as before provided, shall have the same legal effect as if, at the date of such recording, a notarial instrument, containing such part or parts of the conveyance, had been duly expedite and recorded in the appropriate register of sasines in favour of the person on whose behalf the conveyance is presented: Provided that, notwithstanding such clause of direction, it shall be competent for the person entitled to present the conveyance for registration to record the whole conveyance, or to expedite and record a notarial instrument thereon, as after provided, in the same manner as if the conveyance had contained no such clause of direction; and where such notarial instrument shall be expedite, no part or parts of the conveyance directed to be recorded shall be omitted from such instrument."

**608.** Another method sometimes adopted is to stipulate that the whole conveyance shall be recorded in the appropriate register of sasines within a short period, and that the unrecorded conveyance shall not be assignable to any person or persons, or available as a warrant for any notarial or other instrument or notice of title.<sup>1</sup> Or there may be a combination of the methods above mentioned, *e.g.* a direction to insert the real burdens in the infestment to follow on the conveyance, and to insert or duly refer to them in all future transmissions and other writs relating to the subjects, this direction being fenced by an irritant as well as a resolute clause, and a stipulation that the whole conveyance shall be recorded in the appropriate register of sasines within a certain period, and that, prior to such recording, it shall not be assignable or available as a warrant for any notarial or other instrument or notice of title.

(xiii) *Discrepancy between Dispositive and Other Clauses.*

**609.** The dispositive clause is the ruling clause of a feu-charter or other conveyance of lands.<sup>2</sup> Accordingly, an unambiguous dispositive clause in an *inter vivos* conveyance of lands cannot be modified by reference to either the narrative clause<sup>3</sup> or the executive clauses<sup>4</sup> of the deed. But where the terms of the dispositive clause are susceptible of more than one interpretation, other parts of the deed may be referred to in aid of its construction;<sup>5</sup> and where the dispositive clause of a deed has manifestly omitted something which is contained in the other clauses, the omission has been supplied from these clauses.<sup>6</sup>

<sup>1</sup> Bell, Conv. i. 616.

<sup>2</sup> Ersk. iii. 8, 47.

<sup>3</sup> *Chancellor v. Mosman*, 1872, 10 M. 995; and see *Inglis v. Gillanders*, 1895, 22 R. 266; affd. 1895, 22 R. (H.L.) 51; *Duke of Sutherland's Trs. v. Countess of Cromartie*, 1895, 22 R. 839; rev. 1896, 23 R. (H.L.) 32.

<sup>4</sup> *Forrester v. Hutchison*, 1826, 4 S. 824; *Shanks v. Kirk Session of Ceres*, 1797, 1 Ross's L.C. 42.

<sup>5</sup> *Orr v. Moir's Trs.*, 1892, 19 R. 700; rev. 1893, 20 R. (H.L.) 27.

<sup>6</sup> See, *e.g.*, *Sutherland v. Sinclair*, 1801, Mor. App. voce "Tailzie," i. No. 8; 1 Ross's L.C. 40; and *cp. Earl of Aboyne v. Farquharson*, 16th November 1814, F.C.; *Grahame v. Grahame*, 20th June 1816, F.C.; and *L. C. Eldon in Innes v. Kerr*, 1810, 5 Pat. 320, at 444, reviewing the judgment in *Hay v. Hay*, 1788, Mor. 2315; affd. 1789, 3 Pat. 142.



SUBSECTION (4).—*Term of Entry.*

**610.** Before the Lands Transference Act, 1847, the term of entry was contained in the clause of assignation of rents. Since then the statutory form of the clause of entry has been: "With entry at the term of . . ." The date of entry ought always to be set forth; but if it is not, it will be determined in accordance with the provisions of s. 28 of the Conveyancing Act, 1874, which enacts:

"Where no term of entry is stated in a conveyance of lands, the entry shall be at the first term of Whitsunday or Martinmas after the date or last date of the conveyance, unless it shall appear from the terms of the conveyance that another term of entry was intended."

In a contract of sale of heritable subjects the term "immediate entry" means merely such early possession as is possible and practicable in the circumstances.<sup>1</sup>

SUBSECTION (5).—*Tenendas.*

**611.** The object of this clause is (1) to point out the superior of whom the lands disposed are to be held, and (2) to specify the tenure by which they are to be held. The holding under an original grant is, and has always been, a holding *de me*, permanently subordinate to the granter and his successors. Originally, in addition to expressing the kind of holding, the *tenendas* clause contained a list of accessories, privileges, and servitudes which pass *sub silentio* as pertinents of the grant, and also the destination to heirs. The part of the *tenendas* containing the destination to heirs was called the *habendum*. The specification of accessory rights was continued in charters from the Crown until the Crown Charters Act, 1847,<sup>2</sup> but long before that it had been omitted from charters by subject-superiors, in respect that it was superfluous, the extent of the grant being governed by the dispositive clause, and parts and pertinents being carried without enumeration. But on the other hand, while the *tenendas* is not a conveying clause, it has been judicially recognised as an appropriate clause for the specification of pertinents, and the mention of specific rights in the clause may raise a presumption in favour of the disponee, so as to entitle him to establish a right by evidence of possession.<sup>3</sup>

SUBSECTION (6).—*Reddendo.*

**612.** This clause specifies the payments or other prestations to be made by the vassal. In old feus these are found to consist of a great variety of different forms of returns for the grant, e.g. (1) an annual

<sup>1</sup> *Heys v. Kimball & Morton*, 1890, 17 R. 381.

<sup>2</sup> 10 & 11 Vict. c. 51.

<sup>3</sup> See Lord Colonsay in *Lord Advocate v. Sinclair*, 1865, 3 M. 981; *affd.* 1867, 5 M. (H.L.) 97; and see *Lord Advocate v. McCulloch*, 1874, 2 R. 27; *Smith v. Ballingal*, 1895, 2 S.L.T. 503 (salmon fishings); *Menzies*, 551.



payment in Scots currency; (2) the like in sterling; (3) an annual payment in money but regulated by the price of commodities, usually the grain fiars; (4) an annual return in grain or other fungible; (5) carriages or other services; (6) duplicands or triplicands of the feu-duty, payable at periodical intervals, certain or uncertain; (7) the common law and statutory "casualties"<sup>1</sup> of relief and composition (see CASUALTIES OF SUPERIORITY and SUPERIOR AND VASSAL). Agricultural services cannot be claimed for past years; if not claimed within the year, they are lost altogether.<sup>2</sup> But arrears of payment in kind, *e.g.* grain, poultry (kain), etc., may be claimed.<sup>3</sup> The following paragraphs shew the modifications made on the *reddendo* clause by the Acts of 1874, 1914, and 1924.

(i) 1874 *Act*.

**613.** The Conveyancing Act, 1874, provided that in future feus the annual feu-duty must be of fixed amount or quantity; but it was left lawful to stipulate for a permanent increase or reduction of the feu-duty, provided that the amount of the increase or reduction was certain, and that the time or times from and after which the increase or reduction was to have effect were also certain, and not dependent upon any event or occurrence except the occurrence or recurrence of the time or times at which the increase or reduction was to have effect. In feus granted after the Conveyancing Act, 1874, no casualties or duties are by law, irrespective of express condition or covenant, payable to the granter of the feu or his successors in the superiority; but while it was not lawful to stipulate for any casualty to be paid on the succession of an heir or the acquisition by a singular successor, it was lawful to stipulate for payment of a casualty in the form of a periodical fixed sum or quantity provided that the periodical additional sum or quantity was certain, and that the time or times at which the additional sum or quantity should be exigible were also certain, and not dependent upon any event or occurrence except the occurrence or recurrence of the time or times at which the periodical sum or quantity was made exigible (s. 23). The Act also introduced redemption of casualties in the option of the vassal, but giving to the superior the option whether the compensation should be one lump sum paid down or an addition to the feu-duty. The Act also provided for redemption of carriages and services as stated below.

(ii) 1914 *Act*.

**614.** The Feudal Casualties Act, 1914 (so far as here strictly material), provided, as to future feus, that the annual feu-duty must be of fixed amount or quantity, and that there must be no payment at intervals of more than one year, this being aimed at all forms of casualties. But it was left lawful to stipulate for a permanent increase or reduction

<sup>1</sup> *Heyes v. Kimball & Morton*, 1890, 17 R. 381.

<sup>2</sup> *Young v. Bruce*, 1693, Mor. 13071.

<sup>3</sup> *Duke of Hamilton v. Mather*, 1835, 14 S. 162; *affd.* 1837, 2 Sh. & M'L. 586.

of the feu-duty provided it was certain as to both amount and time (s. 18). As regards prior feus the extinction of casualties was made practically compulsory. The initiative lies with either superior or vassal, and it is for the latter to elect between compensation by lump sum or by increased feu-duty, and there is a time limit (1st January 1930), on the expiry of which there is automatic extinction of casualties without compensation. See CASUALTIES OF SUPERIORITY.

(iii) 1924 Act.

615. The Conveyancing Act, 1924, contains (s. 12) the following provisions applicable to the *reddendo* clause. First, as to future feus the feu-duty must be expressed in sterling money; this excludes from future feus all grain feu-duties and all feu-duties measured by grain prices and other standards of that kind. Second, as to prior feus, all feu-duties not expressed in money must be converted to money. The parties may adjust terms and sign and record an agreement. If this is not done before 31st December 1932 the rule of conversion is the average annual value of the ten years 1923–1932; the parties are then bound to sign and record an agreement stating the annual amount in money; if they fail, either may obtain a decree of the sheriff to the like effect and may record it. The agreement or decree binds heritable creditors and singular successors. In the case of divided feus, if the superior has allocated the feu-duty, each part is regarded as a separate feu; if not, any part owner may after 31st December 1932 carry through the conversion for all. All these enactments apply also to dry multures, not already payable in fixed sterling, whether payable to the superior or to anyone else.

(iv) *Carriages and Services.*

616. By ss. 20 and 21 of the Conveyancing Act, 1874, power of commutation of carriages and services stipulated for under feu-rights was conferred on both superior and vassal. These sections provide:

- (1) Where carriages and services, or any of them, exigible by the superior shall for any period of five years have been commuted to an annual money payment by agreement between the parties, whether reduced to writing or not, and whether express or implied from the conduct or actings of parties, and have not thereafter been exacted or performed, the annual payment shall thereafter be deemed to be the value in all time coming of the carriages and services respectively, and the superior shall be bound to accept the same (s. 20).
- (2) With respect to carriages and services which have not been so commuted, it shall be competent to either party to apply to the sheriff to determine summarily the annual value thereof, and the determination of the sheriff shall be final and not subject to review, and the superior shall be bound thereafter to accept of the annual sum so determined (s. 20).

(3) The annual money value, where ascertained by agreement, may be stated in the memorandum in the form set forth in Schedule G annexed to the Act, or in a similar form, signed by the parties or their respective agents; and on the memorandum, or the extract decree pronounced by the sheriff, as the case may be, being recorded in the appropriate register of sasines, the annual money value shall be deemed to be feu-duty, with all the legal qualities thereof, and shall form an addition to any existing feu-duty, and the superior's right to the carriages and services shall be held to be discharged (s. 21).

(4) The discharge and commutation may be validly effected, although the lands are held under the fetters of any entail (s. 21).

The 1924 Act (s. 12 (7)) goes much further, for it enacts that if the 1874 Act procedure has not been carried through before 1st January 1935 the right to the carriages and services shall be extinguished without compensation.

#### (v) *Interest on Feu-duties.*

**617.** Interest is not due on feu-duties *ex lege*, but it may be, and now invariably is, stipulated for. Apart from stipulation, it runs from the date of a judicial demand for payment.<sup>1</sup>

#### (vi) *Limit of Vassal's Liability.*

**618.** It will of course be understood that each succeeding vassal is personally liable for the feu-duty for the period of his ownership, and this without any express personal obligation in the charter, which indeed it would be difficult to insert, seeing that it is a unilateral deed. The liability rests on the feudal relation of superior and vassal. But it is a different thing if it be suggested that the original feuar, his estate and representatives, shall remain liable for the feu-duty permanently, after death or alienation of the feu or both. The rule is that they do not. They are liable for obligations prestable up to the date of death or alienation, including a proportion of feu-duty to that date, but for nothing further, and they are not liable for damages for subsequent breach of contract;<sup>2</sup> that is on the assumption that the successor on alienation is infeft and that notice of change of ownership is given. The rule is altered if the feuar binds his heirs, executors, and successors jointly and severally, the result of which is to bind the feuar's estate and his general representatives for ever.<sup>3</sup>

**619.** It is competent to make the feu-duty payable to, not the superior, but a third party and his successors;<sup>4</sup> but there being then

<sup>1</sup> *Marquis of Tweeddale v. Aytoun*, 1842, 4 D. 862; *Marquis of Tweeddale's Trs. v. Earl of Haddington*, 1880, 7 R. 620; *Napier v. Spier's Trs.*, 1831, 3 Ross's L.C. 109.

<sup>2</sup> *Aiton v. Russell's Exrs.*, 1889, 16 R. 625.

<sup>3</sup> *Dundee Police Commrs. v. Straton*, 1884, 11 R. 586.

<sup>4</sup> *Brown v. Carron Co.*, 1909 S.C. 452.

no privity, the whole right so far as operating in favour of a third party, and not only arrears, may be lost by the negative prescription.

SUBSECTION (7).—*Assignment of Writs.*

620. The statutory form of this clause in the transmission of a fee of property already created is: "And I assign the writs, and have delivered those specified in" an inventory; and it imports, unless specially qualified, an absolute and unconditional assignation to such writs and evidents, and to all open procuratories, clauses, and precepts, if any, and, as the case may be, therein contained, and to all unrecorded conveyances to which the disponent has right. This statutory form is not suited to an original feu-right, in which there should be a clause of assignation of writs but only to the effect of maintaining and defending the right of the grantee, and an obligation on the part of the superior to make them furthcoming on all necessary occasions. Where the vassal is to get right to any special obligation, such as an obligation of relief from stipend and augmentations of stipend contained in the superior's titles, the right requires to be specially assigned. If, however, a superior, in feuing, grants a clause of relief from minister's stipend and future augmentations in favour of his vassal, and his vassal disposes to a third party, the latter obtains the benefit of the obligation without special assignation thereof to him, on the ground that it is an inherent condition of the original grant, and therefore runs with the lands.<sup>1</sup> But if a vassal in transmitting his feu inserts a clause of relief in favour of the purchaser, then, though the purchaser will have the benefit of it, neither his heir (unless he completes title by service) nor his disponee is entitled to found on the obligation of relief unless it has been specially assigned, because it is an obligation only collateral to the title to the land.<sup>2</sup> Prior to the Conveyancing Act, 1874, the form of assignation to obligations or rights of relief which did not pass under the general assignation of writs was as full and explicit as the assignation to a bond; but by s. 50 of the Act a shorter form of assignation was introduced, and the assignation may be in a separate deed or may form part of another deed.

621. By s. 19 of the Consolidation Act, 1868, it was enacted that where a person should have granted or should grant a general disposition of his lands, whether by a conveyance *mortis causa* or *inter vivos*, or by a testamentary deed or writing, the disposition should be a sufficient warrant for a notarial instrument in favour of the disponee. The Court held, however, in the case of *Smith v. Wallace*,<sup>3</sup> that, to enable

<sup>1</sup> *Stewart v. Duke of Montrose*, 1860, 22 D. 755; *affd.* 1863, 1 M. (H.L.) 25; *Lennox v. Hamilton*, 1843, 5 D. 1357; and *Hope v. Hope*, 1864, 2 M. 670.

<sup>2</sup> *Spottiswoode v. Seymer*, 1853, 15 D. 458; *Horne v. Breadalbane's Trs.*, 1841, 3 D. 435; *rev.* 1842, 1 Bell's App. 1; *Sinclair v. Marquis of Breadalbane*, 1844, 6 D. 378; *rev.* 1846, 5 Bell's App. 353. See 1 Ross's L.C. 50 *et seq.*

<sup>3</sup> 1869, 8 M. 204.



a person, other than the original donee under a general disposition, to complete a title by a notarial instrument in terms of s. 19 he required to have an assignation, general or special, of the general disposition. This decision, in respect that a general disposition does not usually contain an assignation of writs, made it incompetent to use two or more general dispositions as connecting links of a series of titles. The Conveyancing Act, 1874, to remedy this state of the law, provides by s. 29:

“No decree, instrument, or conveyance under this Act, and no other decree, instrument, or conveyance, whether dated before or after the commencement of this Act, shall be deemed to be invalid because the series of titles connecting the person obtaining such decree, or expeding such instrument, or holding such conveyance, with the person last infeft, shall contain as links of the series two or more general dispositions, or because any general disposition forming a part of the series does not contain a clause of assignation of writs.”

It is worth noting that a clause, *e.g.* of relief of certain public burdens, in a conveyance may be so worded as not to be assignable to a donee. Thus, a Crown vassal disposed certain lands to King George III., and the conveyance contained an obligation by the disponent to relieve His Majesty “and his royal heirs and successors” of certain burdens, and it was held that the obligation was in favour of the Crown alone, and not assignable to a vassal in part of the lands.<sup>1</sup>

#### SUBSECTION (8).—*Assignation of Rents.*

622. There is no question on which greater difficulty and more litigation arise than this: which is the first rent which the purchaser is to receive? Assuming that the rights of parties are left to be regulated by the statutory clause “and I assign the rents,” the purchaser receives:

1. The rents to become due for the possession following the term of entry according to the legal and not the conventional terms, unless in the case of *forehand* rents.

2. In the case of *forehand* rents the rents payable at the conventional terms subsequent to the date of entry.<sup>2</sup>

Three leading rules are: (1) the rent of an arable farm is legally due one-half at Whitsunday after sowing and the other half at Martinmas after reaping; (2) the rent of a pasture farm is legally due one-half on entry at Whitsunday and the other half at Martinmas following;<sup>3</sup> and (3) a farm must be either arable or pastoral; if it partake of both elements it is classed according as the one or the other prevails.<sup>4</sup>

<sup>1</sup> *Orr-Ewing v. Earl of Cawdor*, 1884, 11 R. 471; *affd.* 1884, 12 R. (H.L.) 12; see also *Lullo v. Aberdeen Mags.*, 1903, 5 F. 740.

<sup>2</sup> 31 & 32 Vict. c. 101, ss. 5 and 8.

<sup>3</sup> Note that these are *not* *forehand* rents, and that pasture rents practically cannot be *forehand*.

<sup>4</sup> *Mackenzie's Trs. v. Somerville*, 1900, 2 F. 1278.

(i) *Non-forehand Rents.*

623. The term includes rents either (a) payable at the legal terms; or (b) postponed, *i.e.* backhand. With regard to the first class there is no difficulty. In ascertaining the purchaser's rights to the second class, disregard postponement and conventional terms. Suppose the rents were payable at the legal terms. What would then be the first half-year's rent payable after the purchaser's entry? No matter when that rent may be conventionally payable, it is the first which the purchaser receives. A purchaser entering at Martinmas gets the whole rent of next year's crop, and no part of the rent of the crop of the year of his entry. A purchaser entering at Whitsunday gets the second half of the rent for that year's crop.

(ii) *Forehand Rents.*

624. The purchaser (1) has no drawback for rents received before, though applicable to the period after, his entry; <sup>1</sup> (2) does not receive rents payable at his entry for the period following; but (3) is restricted to rents conventionally payable after his entry.

625. Note the words "to become due" in the statutory interpretation as regards non-forehand rents. It has been decided that these words exclude the purchaser from any rent legally due at the term of entry. This would make two conditions which the purchaser must prove in order to support his claim, *viz.*, that the rent was (1) legally due after his entry,<sup>2</sup> and (2) so due for possession after his entry.<sup>2</sup> These conditions have their chief application in the case of pasture rents, *e.g.* if the purchaser and the tenant of a grass farm both enter at Whitsunday, and if the assignation of rents is not qualified, the seller, and not the purchaser, is entitled to the tenant's first half-year's rent irrespective of when it is conventionally payable. One reason given is that it is legally due at the term of entry, and therefore cannot then be included amongst rents "to become due." Another reason given is that it is not for subsequent possession.

(iii) *Examples.*(A) *Arable Farm.*

626. 1. Tenant's entry Martinmas 1926. Rent, £100. Under lease, first £50 payable Whitsunday 1927; second, Martinmas 1927. These are the legal terms. Purchaser entering Martinmas 1927 receives the 1928 £100; entering Whitsunday 1928 receives Martinmas 1928 £50.

2. Tenant's entry to houses and grass at Whitsunday 1926 and to arable land at Martinmas 1926. Rent and terms as in No. 1. Again, these are the legal terms. Purchaser entering Whitsunday 1926 receives outgoing tenant's last half-year's payment and all the new tenant's payments.

<sup>1</sup> But see *Butler v. Foster*, 1912 S.C. 1218 (house and shootings).

<sup>2</sup> *Mackenzie's Trs. v. Somerville*, *supra*.

3. In either of cases 1 and 2 the lease provides that first £50 is payable at Martinmas 1927 and second at Whitsunday 1928. Legal terms would have been Whitsunday and Martinmas 1927. This is six months' backhanding. Purchaser entering Martinmas 1926 receives nothing till Martinmas 1927.

4. In either of cases 1 and 2 the lease provides that first £50 is payable Martinmas 1926 and second Whitsunday 1927. This is six months' forehanding. Whenever purchaser enters he receives all rents payable after his entry, but not rent payable at his entry. If he enters between terms, *e.g.* 1st August, he receives the Martinmas rent.

(B) *Pasture Farm.*

627. 5. Tenant enters Whitsunday 1926. Rent, £100. Under lease, first £50 payable Whitsunday 1926 and second Martinmas 1926. These are the legal terms for a pasture farm; this is not forehand. Purchaser, entering Whitsunday 1926, receives as his first rent £50 payable Martinmas 1926.

6. Tenant enters Whitsunday 1926. Rent, £100. Under lease, first £50 payable Martinmas 1926, and second Whitsunday 1927. This is six months' backhanding. Purchaser entering Whitsunday 1926 receives nothing until Whitsunday 1927.

The above is believed to be correct; but it must be admitted that even yet the position in regard to pasture rents is not too clear.

(C) *Urban Property.*

628. 7. Forehand rents only need be referred to. Tenant enters Whitsunday 1927. Under lease, half-year's rent is payable on entry. Purchaser entering Whitsunday 1927 appears entitled to nothing until Martinmas 1927, seller taking Whitsunday 1927 rent. For this is forehand, and in that case the Act carries only "rents payable at conventional terms subsequent to the date of entry." There is, however, reason to believe that in the case of, say, tenement sales, the purchaser is usually allowed to receive and retain forehand rents which strictly ought to go to the seller, and this without any qualification of the assignation of rents. This is no doubt because it is recognised that justice requires that the purchaser should receive the full rents for the possession after his entry.

Applying the judgment in the *Faskally* case,<sup>1</sup> urban forehand rents would apparently be given to the purchaser for the possession after his entry. But obviously it is not proper to run the risk of question, and the missives ought to be clear.

(D) *Game and Other Seasons' Rents.*

629. On the authority of *Lord Glasgow's Trs. v. Clark*,<sup>2</sup> these fall to be apportioned in respect of the periods of the shooting, or other seasons, before and after the term of the purchaser's entry.

<sup>1</sup> *Butter v. Foster, supra.*

<sup>2</sup> 1889, 16 R. 545.

(iv) *Special Qualifications.*

**630.** The following have been held not to be special qualifications and to have the same effect as the statutory clause, viz. : (1) “the rents due and payable from and after the term of entry”;<sup>1</sup> and (2) “the rents payable by tenants from and after the term of entry.”<sup>2</sup> But clearly if no alteration be intended, the statutory clause ought to be adhered to.

**631.** Having regard to questions as to (1) whether farms are arable or pasture; (2) pasture rent law; and (3) peculiarities in leases and variations in practice from the lease stipulations, the practical advice tendered is either (1) to prepare a schedule, detailing all the tenancies and specifying the first rent which the purchaser is in each case to receive; or (2) with entry at, say, Whitsunday 1927, to make an express paction that the purchaser is entitled to only all rents *de facto* payable by tenants, according to their contracts and the estate custom, after Whitsunday 1927, and to all these, irrespective of legal terms, or crops, or possession, or season, the paction to be binding notwithstanding any misunderstandings or errors in fact or law. The price can be adjusted accordingly, or a further fixed sum may be made payable in addition to, and along with, the price.

**632.** Intimation to tenants of the assignation of rents in a feu-right or deed of transmission is not necessary after infeftment is taken.<sup>3</sup> If infeftment is not taken, intimation of it should be made to the tenants. The intimation will be sufficient to preclude the tenants from paying their rents to the granter of the deed containing the assignation;<sup>4</sup> and by it a preference to the rents will be secured in a question with an arrester whose arrestment was used after the intimation, or with the holder of a subsequently intimated personal title. But the intimation of the assignation of the rents, although good to the extent mentioned, is liable to be defeated by the completion of a real right in the person of a creditor, or of another disponee, of the seller.<sup>5</sup>

SUBSECTION (9).—*Obligation to Relieve of Public Burdens, etc.*

**633.** The statutory form of this clause in a disposition is: “And I bind myself to free and relieve the said disponee and his foresaids of all feu-duties, casualties, and public burdens”;<sup>6</sup> and, unless specially qualified, it is held “to import an obligation to relieve of all feu-duties or other duties or services or casualties payable or prestable to the superior, and of all public, parochial, and local burdens due from or on account of the lands conveyed prior to the date of entry.” While the statutory form of the clause may be used in an original feu-right, the

<sup>1</sup> *Lord Glasgow's Trs. v. Clark*, *supra*.

<sup>2</sup> *Macdonald v. Baillie*, 1900, 8 S.L.T. 231.

<sup>3</sup> *Webster v. Donaldson*, 1780, Mor. 2902.

<sup>4</sup> *Flowerdew v. Buchan*, 1835, 13 S. 615.

<sup>5</sup> *Huntly v. Hume*, 1628, Mor. 2764; *Erskine v. Wallace*, 1748, Mor. 2901; *Menzies*, 558; *Bell*, Conv. i. 641.

<sup>6</sup> 31 & 32 Vict. c. 101, s. 8, and Sched. (B), No. 1.



common form of the clause in a deed of that nature is as follows :  
 “ And I bind and oblige myself to free and relieve the said B. and his successors of all feu-duties and casualties payable to my superiors now and in all time coming, and of all public, parochial, and local burdens exigible prior to the said date of entry.” The effect of the clause in either form is that the granter of the conveyance is not liable, in a question with the grantee, in payment of any public burdens imposed on the land, and due for the possession after the date of entry.

**634.** In feu-rights and deeds of transmission clauses of relief from public burdens imposed or to be imposed on the lands are not infrequent. Such clauses are interpreted so as to give effect to the meaning and intention of the parties as expressed in the contract;<sup>1</sup> and, if the clause is ambiguous, it will be construed by the actings of parties over a period of years.<sup>2</sup> Such clauses are held, as a rule, not to include burdens imposed by laws enacted after the date of the obligation, inasmuch as these are presumed not to have been in contemplation at the time of entering into the contract. “Parties may no doubt so frame a clause of relief that it shall embrace all burdens, whether the continuation of old taxes or their extension, or the creation of new taxes never dreamt of at the date of the contract. But clauses to have this effect must be very clearly expressed, and under such general words as ‘imposed or to be imposed’ total relief from new and unthought-of burdens is not to be presumed.”<sup>3</sup> If, however, a public burden falling under a clause of relief is reimposed by a statute under which the object and the incidence of the burden are the same as under the former law, the burden so reimposed is not considered a burden imposed by a supervenient law. Thus, in the case of *Dunbar’s Trs.*,<sup>4</sup> lands were feued in 1823 for the erection of a harbour, and the superior bound himself to relieve the vassal of the whole tithess or land tax, . . . ministers’ stipends, schoolmasters’ salaries, and other public burdens due and exigible out of the whole lands and subjects hereby feued, or that may become due and payable for or from the same in all time coming.” The vassals in 1877 claimed relief from poor-rates imposed on them as owners of the lands and buildings erected thereon under the Poor Law Amendment Act, 1845, and relief therefrom was granted on the ground that the poor-rate imposed by the Act of 1845 was in its object and incidence the same as the poor-rate payable at the date of the contract, and therefore not a new burden.<sup>5</sup>

**635.** If the incidence or the application of a burden is altered by a statute so as to become a new burden, a clause granting relief from the former will not entitle to relief from the latter. “There may be,” said

<sup>1</sup> See *Duff v. Earl of Seafield*, 1883, 11 R. 126.

<sup>2</sup> *Jopp’s Trs. v. Edmond*, 1888, 15 R. 271.      <sup>3</sup> *Scott v. Edmond*, 1850, 12 D. 1077 at 1085.

<sup>4</sup> *Dunbar’s Trs. v. British Fisheries Soc.*, 1877, 5 R. 350 ; affd. 1878, 5 R. (H.L.) 221.

<sup>5</sup> See also *Lees v. Mackinlay*, 1857, 20 D. 6 ; *Hunter v. Chalmers*, 1858, 20 D. 1311 ; *Paterson’s Trs. v. Hunter*, 1863, 2 M. 234 ; *Nisbet v. Lees*, 1869, 7 M. 881 ; *Preston v. Mags. of Edinburgh*, 1870, 8 M. 502 ; *Wilson v. Mags. of Musselburgh*, 1868, 6 M. 482.

L. C. Cairns in *Dunbar's Trs.*, "a burden existing at the date of the contract, and subsequently the incidence of that burden may be so altered that, although the burden *in specie* remains the same—the same in name, and the same in application—still a change subsequently made by law in the incidence of the burden may be such that it becomes, with reference to a contract of this kind, a new burden, and is no longer covered by the contract; or, on the other hand, the incidence of the burden may remain the same and yet the application of the burden may be so entirely different that the burden will become, although the same in name, yet a different burden *in specie*, and no longer be covered by the contract." Accordingly, where, at the date of the feu in the case of *Dunbar's Trs.*, the roads of the county were maintained under a local Statute Labour Conversion Act, providing for an assessment according to valued rent, leviable from owners in the personal occupation of their land, etc., and at the date when the action was raised by the vassals for relief from road assessment as well as poor-rates, the roads were maintained under an Act which abolished tolls, and assessed the whole sum required for the roads on owners and occupiers according to real rent, relief for the road assessment was refused to the vassals, because, although the burden was the same in name, and the object of the burden was the same as at the date of the feu, yet the incidence of the burden had been so entirely altered that it had become a new burden. For similar reasons a disponent,<sup>1</sup> under a disposition dated in 1861, with a clause of relief from "all schoolmaster's salary" from thenceforth and in all time coming, was held not entitled to relief from his disponent of school-rates imposed under the Education (Scotland) Act, 1872. But, while the presumption thus is that these obligations apply only to existing burdens and to future burdens similar in character and incidence, that presumption may be displaced by long contrary usage, and it was held to be displaced in the case undernoted.<sup>2</sup> In *Lindsay v. Bett*<sup>3</sup> it was held that the obligation did not apply to property tax on the ground that it is a personal tax. Even an express clause to relieve of that tax would not be enforceable since it would fall under the nullity section of the Income Tax Acts.<sup>4</sup>

**636.** If the vassal, holding such an obligation of relief, has subfeued without communicating the relief in any form to the subfeuars, he cannot recover from his superior what the subfeuars have paid, and *quære*, whether the obligation can legally be so communicated.<sup>5</sup> On the other hand, whether the vassal possesses the property personally or through tenants, the superior's obligation may cover the annual charges on occupiers as well as on owners.<sup>6</sup> In *Latto's* case it was recognised that the cost of the relief to the superior may exceed the

<sup>1</sup> *Stewart v. Earl of Seafield*, 1876, 3 R. 518.

<sup>2</sup> *North British Rly. Co. v. Mags. of Edinburgh*, 1920 S.C. 409.

<sup>3</sup> 1898, 25 R. 1155.

<sup>4</sup> 8 & 9 Geo. V. c. 40, General Rules 23 (2).

<sup>5</sup> *Latto v. Aberdeen Mags.*, 1903, 5 F. 740.

<sup>6</sup> *North British Rly. Co. v. Mags. of Edinburgh*, *supra*.

feu-duty payable to him. When there is long delay in enforcing these obligations of relief, the claimant for relief may be confronted with practical difficulties as to the debtors to be sued, and their respective shares of the arrears; interest will not be given.<sup>1</sup>

**637.** Most of the cases relating to clauses of relief from burdens imposed or to be imposed relate to relief claimed from augmentation of stipend, which is a burden on the teinds. "Warrandice," says Mr Duff, "against payment of teinds and stipend does not protect against future augmentations, unless that term be used, or words admitting of no other construction. In construing a clause of this nature it is of importance to observe if the teinds do or do not belong to the disponee. If the former, then it will require very clear expressions to relieve him from future augmentations of stipend; but if the latter, warrandice simply against teinds and stipends seems necessarily to imply relief from present and future stipends. The reason is that as the surplus teind over what is payable to the minister belongs to the titular, and warrandice against payment of teinds relieves the disponee of the burden of payment to the titular of whatever that surplus consists of at the date of the conveyance, the burden so taken from the disponee cannot be revived, in whole or in part, by the modification of a larger stipend to the minister, who in effect thus merely takes away another portion of teind from the titular."<sup>2</sup> In the case of *Welwood's Trs. v. Mungall*,<sup>3</sup> an obligation of relief from "teind duties and minister's stipend" was held to cover all augmentations both when lands had been feued with, and without, teinds. These decisions proceeded partly on usage.

**638.** The obligation to relieve of burdens imposed or to be imposed is not confined to the lands, but extends to all buildings erected thereon.<sup>4</sup> It is not limited to the amount of the feu-duty, at least in cases where buildings or other improvements were in the contemplation of parties at the date of the grant.<sup>5</sup> It has also been settled that an obligation of relief granted by a superior is binding on his successors in the superiority, but not on his general representatives when he has simply bound himself and his heirs and successors to

<sup>1</sup> *Durie's Trs. v. Ayton*, 1894, 22 R. 34.

<sup>2</sup> Duff, *Feudal Conveyancing*, p. 89; and see *Cunninghame v. Cuthbertson*, 27th January 1829, F.C.; *Baird's Trs. v. Lord Lynedoch*, 1830, 8 S. 622; *Wilson v. Agnew*, 1831, 9 S. 357; *Pedie v. Governors of Heriot's Hospital*, 1839, 1 D. 871; *Horne v. Brcadalbane's Trs.*, 1843, 3 D. 435; *Lennox v. Hamilton*, 1843, 5 D. 1357; *Paterson v. Duke of Hamilton*, 1843, 5 D. 1313; *Stevenson v. Speirs' Trs.*, 1858, 20 D. 651; *Stewart v. Duke of Montrose*, 1860, 22 D. 755; *affd.* 1863, 1 M. (H.L.) 25; *Hope v. Hope*, 1864, 2 M. 670; *Campbell's Trs. v. Dingwall*, 1865, 4 M. 50; *Lord Rosslyn v. North British Rly. Co.*, 1865, 4 M. 140; *Preston v. Mags. of Edinburgh*, 1870, 8 M. 502; *McCallum v. Stewart*, 1868, 6 M. 382; *affd.* 1870, 8 M. (H.L.) 1; *Reid's Trs. v. Duchess of Sutherland*, 1881, 8 R. 509.

<sup>3</sup> 1921 S.C. 911.

<sup>4</sup> *Dunbar's Trs. v. British Fisheries Society*, 1877, 5 R. 350; *affd.* 1878, 5 R. (H.L.) 221; *Lees v. Mackinlay*, 1857, 20 D. 6; *Hunter v. Chalmers*, 1858, 20 D. 1311; *Paterson's Trs. v. Hunter*, 1863, 2 M. 234; *Nisbet v. Lees*, 1869, 7 M. 881; *Preston v. Mags. of Edinburgh*, 1870, 8 M. 502; and see *Smith, Laing & Co. v. Maitland*, 1876, 3 R. 281.

<sup>5</sup> *Dunbar's Trs.*, *supra*.



implement it.<sup>1</sup> It has already been pointed out<sup>2</sup> that where an obligation of relief is granted by a superior to a vassal it runs with the lands, but that when the relationship of superior and vassal does not subsist between the grantor and grantee of such an obligation, the singular successors of the grantee require to have it specially assigned to them.

**639.** These obligations of relief have in Scotland commonly been called clauses of warrandice, this arising probably from the case of the grantor conveying teinds with the lands, and binding himself to relieve the disponee of future augmentations of stipend, which partakes of the nature of an obligation warranting the teinds against future augmentations. But these clauses are not truly of the nature of warrandice; they are covenants of indemnity,<sup>3</sup> a distinction which is of importance in connection with the position of a subsequent disponee without an express assignation of the right of indemnity, for, as has been explained above, that right does not "run with the lands" (except between superior and vassal) as proper warrandice does.

**640.** When the superior undertook to take the feuars on the opposite side of the road bound to relieve the first feuars of one-half of a certain annual liability (the upkeep of a road), and the opposite ground was never feued because it was acquired by a railway company under compulsory powers, and the above-mentioned obligation was not (and probably could not have been) inserted in the railway company's title, the superior was held liable to the feuars in damages.<sup>4</sup>

**641.** The obligation of relief may be by vassal to superior, and in that case the over-superior may be entitled to enforce it against his subvassal.<sup>5</sup>

#### SUBSECTION (10).—*Warrandice.*

**642.** The statutory form of this clause in a disposition is: "And I grant warrandice."<sup>6</sup> Unless specially qualified, the clause is "held to imply absolute warrandice as regards the lands, and writs, and evidents, and warrandice from fact and deed as regards the rents."<sup>7</sup> The clause in its statutory form is as applicable to an original feu-right as to a deed of transmission. If there is no clause of warrandice in a conveyance of heritage, absolute warrandice is implied if a full price has been paid,<sup>8</sup> but it will be noted that where the deed, in which a clause of warrandice in its statutory form occurs, relates to heritage, then, whether it is onerous or gratuitous, the warrandice is absolute as regards the lands, and writs, and evidents, and from fact and deed as regards the rents. The obligation created by the clause against the grantor is to indemnify the grantee in the event of the conveyance in his

<sup>1</sup> *Stewart, supra.*

<sup>2</sup> See para. 620 *supra*.

<sup>3</sup> *Latto v. Aberdeen Mags.*, 1903, 5 F. 740.

<sup>4</sup> *Leith School Board v. Rattray's Trs.*, 1918 S.C. 94.

<sup>5</sup> *Marquis of Tweeddale's Trs. v. Earl of Haddington*, 1880, 7 R. 620.

<sup>6</sup> 31 & 32 Vict. c. 31, s. 5, Sched. (B), No. 1.

<sup>7</sup> *Ibid.*, s. 8.

<sup>8</sup> Bell, Prin., s. 894.



favour being reduced or of his being evicted from the subjects, in whole or in part, on any ground not attributable to the grantee, and to warrant that the rents are due, but not that the tenants are solvent. But absolute warrandice, express or implied, does not, in the absence of agreement to the contrary, protect the grantee against losses or burdens caused by supervenient laws<sup>1</sup> nor against losses and burdens natural to the right,<sup>2</sup> or arising from the nature or legal effects of ownership,<sup>3</sup> nor from servitudes, unless of a very burdensome sort, although in practice the best course is to exempt servitudes from the warrandice.<sup>4</sup> Nor does it entitle him to claim the discharge of an old right of real warrandice on which action has not been threatened.<sup>5</sup> Absolute warrandice under a deed dealing with heritage warrants possession of the subjects conveyed by the dispositive clause, and warrants the assignation of writs for the purpose for which they are assigned, *i.e.* the purpose of maintaining the grantee in possession of what the dispositive clause conveys.<sup>6</sup>

**643.** A grantee who is in right of absolute warrandice can recover the full damage sustained by him on eviction;<sup>7</sup> but it is not decided whether, when the subject has fallen in value, the grantee is entitled only to the value as at the time of eviction, or to the price paid by him for it.<sup>8</sup> Action of recourse, in virtue of a right of warrandice, arises after eviction takes place. It is also competent when eviction is threatened on a ground which is unquestionable and which proceeds from the fault of the granter, *e.g.* where he has made double grants of the same subject in favour of different parties;<sup>9</sup> or if the party against whom the action lies disputes his liability to relieve in the event of eviction.<sup>10</sup>

**644.** Threatened eviction ought in all cases to be intimated to the party liable in the event of eviction. If the purchaser defends and is successful, he has no claim in virtue of his warrandice to the expense of his defence;<sup>11</sup> but if he defends and omits no competent defence, and is unsuccessful, he has a claim for the expenses of the action against

<sup>1</sup> *Watson v. Law*, 1667, Mor. 16588; *Muirhead v. Lord Colvil*, 1715, 5 Bro. Supp. 125; *Elphinstone v. Lord Blantyre*, 1663, Mor. 16585; *Bonar v. Lyon*, 1683, Mor. 16606.

<sup>2</sup> *Drummond v. Steuart*, 1549, Mor. 16565; *Cunninghame v. Cuthbertson*, 1829, Shaw's Teind Cases, 175; *MacRitchie's Trs. v. Hope*, 1836, 14 S. 578; Bell, Prin., s. 895.

<sup>3</sup> *Lumsden v. Gordon*, 1682, Mor. 16606; *Plenderleath v. Lord Tweeddale's Reps.*, 1800, Mor. 16639.

<sup>4</sup> *Urquhart v. Halden*, 1835, 13 S. 844; *Gordonston v. Paton*, 1682, Mor. 16606; *Sandilands v. Earl of Haddington*, 1672, Mor. 16599; *Symington v. Cranston*, 1780, Mor. 16637; *Reid v. Shaw*, 1822, 1 S. 334.

<sup>5</sup> *Durham's Trs. v. Graham*, 1800, Mor. 16641; but see Bell, Conv. i. 218.

<sup>6</sup> *Brownlie v. Miller*, 1878, 5 R. 1076; *affd.* 1880, 7 R. (H.L.) 66.

<sup>7</sup> *Cairns v. Howden*, 1870, 9 M. 284; *Carmichael v. Anstruther*, 1821, 1 S. 25; *Galloway v. Gardner*, 1838, 1 D. 74; *Houston v. Corbet*, 1717, Mor. 16619; *Hill v. Yeaman and Hogg*, 1769, Mor. 16631.

<sup>8</sup> See *Cairns*, *supra*.

<sup>9</sup> *Smith v. Ross*, 1672, Mor. 16596; *Ersk. ii.* 3, 30; Bell, Prin., s. 895.

<sup>10</sup> *Melville v. Wemyss*, 1842, 4 D. 385; and see *Lord Ormidale in Leith Heritages Co. v. Edinburgh and Leith Glass Co.*, 1876, 3 R. 789.

<sup>11</sup> See *Stair*, ii. 3, 46; Bell, Conv. i. 219; *Inglis v. Anstruther*, 1771, Mor. 16633.

the party bound in warrandice.<sup>1</sup> If, however, he defends and omits a competent defence, and is unsuccessful, he loses his right of recourse.<sup>2</sup>

645. When there are any leases, it is the proper practice to except them from the warrandice clause.

646. When trustees feu or otherwise dispoise land for a full price, the form of the warrandice clause granted by them is as follows: "And we warrant these presents from our own facts and deeds only, and bind the trust estate under our charge, and the parties beneficially interested therein, in absolute warrandice." A trustee, infeft in certain subjects, after consenting to certain bonds being granted by his author over the subjects, granted a bond and disposition in security for a new loan, which he bound himself "as trustee" to repay, and, in security of the personal obligation, he, "as trustee," dispoised the subjects, and granted a clause of warrandice in these terms: "I grant warrandice." The holder of this bond brought an action against the representative of the trustee, in which it was held that the trustee was personally bound at least in warrandice from fact and deed, and accordingly that he was liable for loss arising from the prior bonds to which he was a consenter, because warrandice from fact and deed infers a protection against eviction by reason of the granter's own act or omission, past or future; and it was questioned, but not decided, whether the trustee, in respect of the clause of warrandice granted by him, was not personally liable in absolute warrandice.<sup>3</sup>

#### SUBSECTION (11).—*Registration.*

647. The statutory form of this clause in a disposition is: "And I consent to registration hereof for preservation,"<sup>4</sup> and it imports, unless specially qualified, a consent to registration and a procuratory of registration in the Books of Council and Session, or other judges' books competent, therein to remain for preservation.<sup>5</sup> This form is quite applicable to an original feu-right; but whereas a disposition or Crown charter can be recorded either "in the Books of Council and Session or other judges' books competent," a feu-charter by a subaltern superior can be recorded for preservation under the Statute 1693, c. 35, only in the Books of Council and Session.<sup>6</sup> But if a feu-charter, with a clause of consent to registration for preservation, is presented for registration in the register of sasines, with a warrant of registration specifying that the writ is to be registered for preservation as well as for publication, and is recorded therein, the registration is held to be registration also in the Books of Council and Session for preservation.<sup>7</sup>

<sup>1</sup> See Bell, Conv. i. 219.

<sup>2</sup> *Clerk v. Gordon*, 1681, Mor. 16605; and see Bell, Prin., s. 895.

<sup>3</sup> *Horsbrugh's Trs., v. Welch*, 1886, 14 R. 67.

<sup>4</sup> 31 & 32 Vict. c. 101, s. 5, Sched. (B), No. 1.

<sup>5</sup> *Ibid.*, s. 138.

<sup>6</sup> Juridical Styles, 6th ed., i. 27; Bell, Conv. i. 645.

<sup>7</sup> 31 & 32 Vict. c. 64, s. 12.

## PART IV.—OTHER FEUDAL GRANTS.

### SECTION 1.—FEU-DISPOSITION.

648. Instead of the feu-charter, the form of the disposition with a holding *de me* was sometimes used to constitute a feudal fee; but except in name the feu-charter and the feu-disposition are now the same.<sup>1</sup>

### SECTION 2.—BLENCH-CHARTER.

649. Blench (or blanch) is that tenure by which a vassal holds land for an illusory yearly duty payable rather as an acknowledgment of, than as a profit to, the superior. The yearly duty may be either in money, as a penny Scots, or in some other subject, as a pound of wax or pepper. The *reddendo* clause in a blench-charter may stipulate simply for payment or fulfilment of the duty, or it may stipulate for payment or fulfilment of the duty *si petatur* or *si petatur tantum*. If the *reddendo* clause stipulates simply for payment or fulfilment of the duty, the duty, if it is a thing of yearly growth, cannot be exacted unless it is demanded within a year after it becomes payable by the *reddendo*; but if it is not a thing of yearly growth, it can be exacted at any time within the years of prescription. If, on the other hand, the *reddendo* stipulates for payment or fulfilment of the duty *si petatur* or *si petatur tantum*, the vassal is relieved from the annual duty, whether it is a thing of yearly growth or not, if it is not demanded within the year.

650. Mr Duff says that this tenure arose when feudal manners began to give place to a certain degree of industry and civilisation,<sup>2</sup> and grants to be held by the tenure of blench were often formerly made because the granter desired to confer on the grantee a free gift for distinguished services, or because the grantee had paid a capital sum to him in lieu of future annual prestations. For these reasons, the use of a blench-charter may still be resorted to; but that charter has fallen almost completely into disuse. Now a feu-charter stipulating for an illusory feu-duty is invariably used where formerly a blench-charter would have been granted. The *tenendas* in a blench-charter formerly bore to be *in libera alba firma*; the *tenendas* in the blench-charter in its modern form bears to be in blench-farm. In a case of doubt there was a presumption against the tenure of blench. Even although the *reddendo* in a charter bears that the duty under it is payable *si petatur* or *si petatur tantum*, the tenure, according to Stair, is not to be accounted blench if it is not also expressed to be payable *nomine albæ firmæ*—in name of blench-farm.<sup>3</sup>

### SECTION 3.—FEU-CONTRACT.

651. Unlike the feu-charter, blench-charter, and feu-disposition, the feu-contract is a bilateral deed, and it is used when parties wish to

<sup>1</sup> Juridical Styles, 6th ed., i. 28; Menzies, 635.

<sup>2</sup> Duff, 49.

<sup>3</sup> Stair, ii. 3, 33.



be able to enforce the obligations undertaken under the deed against the original obligant or obligants by summary diligence. It is convenient also where the agreement is that the feuar shall bind himself and his heirs, executors, and successors jointly and severally. It contains all the ordinary clauses of a charter and an express obligation to pay and perform the several duties and obligations due to the superior, and a clause of registration in which both parties consent to registration for preservation and execution.

#### SECTION 4.—CHARTERS OF NOVODAMUS.<sup>1</sup>

**652.** These are still competent. They are the proper mode of altering the *reddendo*; it is still useful to remember that an ordinary charter by progress without a *novodamus* clause was not a competent mode of doing so.<sup>2</sup> They are appropriate also when titles have been lost, or there is any defect in the titles. But it is recommended that, in these circumstances, the charter of *novodamus* should not contain a declaration by the superior that he is satisfied that the grantee is the true owner; the charter should be taken *periculo petentis*. The superior cannot be compelled to grant a *novodamus*, and he will not do so if he considers that the circumstances of the application are in any way suspicious or unsatisfactory. Warrandice will be either from fact and deed or simple only. The superior will see that everything due to him is paid before the charter is delivered.

**653.** If, as is often the case, the purpose of the *novodamus* is to create additional security for feu-duty, or to impose new conditions of feu, the superior should see that all heritable securities and other burdens on the property are extinguished, and, if necessary, re-created after the *novodamus* is on record. Otherwise the whole procedure may be rendered nugatory by one of the heritable creditors selling under his power of sale, and under the old charter only. When the procedure is as here recommended, resignation is not necessary; and though the feu-duty is increased, it is not necessary to pay full stamp duty as on a really new grant with the increased feu-duty; the old charter must be produced to the Inland Revenue Department.

**654.** It is provided by the 1887 Act that it is no objection to the *novodamus* that it has not been preceded by resignation. But if, for instance in such cases as those referred to in the last paragraph, it is proposed to start a new progress altogether, the new charter will not be called a *novodamus*, and it will be preceded by a resignation *ad remanentiam*.<sup>3</sup>

**655.** From the point of view of a purchaser, lender, or anyone else proposing to deal with the proprietor on the faith of a *novodamus* which

<sup>1</sup> Stair, ii, 3, 15; Ersk. ii. 3, 23; Menzies, 817; Bell, Conv. i. 738, 759, 1150; Juridical Styles, 6th ed., i. 138, 150.

<sup>2</sup> *Hutton v. Macfarlane*, 1863, 2 M. 79; *Boyd v. Bruce*, 1872, 11 M. 243; *Mags. of Inverkeithing v. Ross*, 1874, 2 R. 48; *Minister of Row*, 1925 S.C. 381.

<sup>3</sup> *Earl of Perth v. Lady Willoughby de Eresby's Trs.*, 1877, 5 R. (H.L.) 26.



has been granted to supply the place of missing titles, much must depend on the circumstances of the particular case. But it cannot be stated absolutely that anything less than prescriptive possession on the *novodamus* will give a good title.

656. In the interest of the vassal there is one important objection to accepting a *novodamus* in certain circumstances. A charter of that nature regularly repeats the conditions of the original grant, but there may be such change of circumstances, and such pleas of acquiescence, that it may be questionable whether all these conditions are still enforceable by the superior. In such a situation it would, to say the least of it, be very undesirable in the vassal's interest that he should place himself in the position of accepting a charter which repeats the conditions. Nor is it likely that the superior would agree to any qualifying words, *e.g.* "if and so far as still subsisting and enforceable."

657. The case of *Cadell v. Anderson*<sup>1</sup> shews how careful one must be in preparing charters of *novodamus*. In that case the vassals had held the land under a reservation of coal in favour of the superior, but a *novodamus* had been granted without repeating the reservation, and it was held that this gave the vassal a title to the coal. The same case suggests that, when no change is intended, it is just as well to say so expressly in the narrative. It also shews that when doubt exists the *novodamus* will be construed as only commensurate with the previous titles, but apparently this applies only when the doubt arises on the face of the *novodamus*; and *quære* whether it goes further than allowing the grant in the *novodamus* to be freed from any patent ambiguity arising from other clauses in that deed.

#### SECTION 5.—CHARTER IN WARD.

658. It is interesting to find questions of ward holding coming up as material in a litigation in the twentieth century. That happened in the *Dunstaffnage Castle* case.<sup>2</sup> The defender's family had from ancient times held the lands of X. with pertinents on a ward tenure, the *reddendo* including the guardianship of the castle (which was on X.) and keeping it open to the superior. Those duties involved the occupation of the castle by the vassal. A claim by the vassal to the ownership of the castle failed on the ground that the property of the castle had originally been in the superior; that the Clan Act, 1747, though abolishing military services, did not alter proprietary rights; and that when the writs prior to the defender's prescriptive title were examined (which it was held competent to do) it was seen that the defender's possession had not been adverse to the pursuer.

<sup>1</sup> 1905, 7 F. 606.

<sup>2</sup> *Duke of Argyll v. Campbell*, 1912 S.C. 458.

## CHARTER PARTY.

*See* CARRIAGE BY SEA.

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## CHAUD MELLE.

*See* CRIME.

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## CHEAP TRAINS.

*See* RAILWAYS AND CANALS.

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## CHEATING.

*See* CRIME.

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## CHEMIST.

*See* MEDICINE AND PHARMACY; POISONS.

## CHEQUES.

*See* BANK; BILLS OF EXCHANGE.

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## CHIEF CONSTABLE.

*See* POLICE.

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## CHILD BEARING.

*See* PRESUMPTIONS.

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## CHILD MURDER.

## CHILD STEALING.

## CHILD STRIPPING.

*See* CRIME.

# CHILDREN AND YOUNG PERSONS.

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## PART I.—EMPLOYMENT OF CHILDREN AND YOUNG PERSONS.

### SECTION 1.—EMPLOYMENT GENERALLY.

659. An important distinction has been drawn in several of the Acts dealing with the employment of children and young persons between casual and non-casual employment. Casual employment is defined as “employment for purposes of gain in streets or other places, in vending or exposing for sale any article whatsoever, and also employment of any kind outside the child’s own home, not being employment the lawful period of which is regulated by any Act of Parliament.”<sup>1</sup>

660. As regards non-casual employment, it is not lawful to employ any child under thirteen or between thirteen and fifteen unless such

<sup>1</sup> Education (Scotland) Act, 1878 (41 & 42 Vict. c. 78), s. 6.



child is exempt from school attendance under s. 3 of the Education (Scotland) Act of 1901.<sup>1</sup>

661. As regards casual employment it is not lawful (1) to employ any child under ten,<sup>2</sup> nor (2) to employ any child under eleven in street trading.<sup>3</sup> Street trading is defined<sup>4</sup> as "including the hawking of newspapers, matches, flowers, and other articles, playing, singing, or performing for profit, shoe-blackening, and any other like occupation carried on in streets or public places." Nor is it lawful (3) to employ after 9 p.m. from 1st April to 1st October or after 7 p.m. from 1st October to 1st April any child under thirteen, or between thirteen and fifteen unless exempt from school attendance under s. 3 of the Act of 1901;<sup>5</sup> nor (4) to employ any child under fourteen except in special circumstances between 9 p.m. and 6 a.m.<sup>6</sup> Further, no child under fourteen employed half time under the Factory and Workshops Act, 1901,<sup>6</sup> shall be employed in any other occupation: "A child under fourteen shall not be employed to lift, carry, or move anything so heavy as to be likely to cause injury to the child; and no child under fourteen shall be employed in any occupation likely to be injurious to his life, limb, health, or education, regard being had to his physical condition."<sup>7</sup>

662. These provisions are qualified by the Education (Scotland) Act, 1878,<sup>8</sup> by which a person shall not be deemed to have taken any child into his employment (whether casual or not) contrary to the provisions of that Act and of the Education Scotland Act, 1901,<sup>9</sup> (1) if there is no school within three miles; (2) if the employment is during hours when the school is not open; or (3) if the employment is exempted by a notice which in certain circumstances the education authority are empowered to issue. This relaxation of the prohibitions regarding employment does not apply to children above ten engaged in casual employment, for such employment is not prohibited except after 9 p.m. in summer and 7 p.m. in winter. Accordingly, it is not an offence under the Education Acts to give casual employment to a child above ten even during school hours (though, of course, the parent could be prosecuted for failing to educate). It was so held by Sheriff-Substitute Henderson Begg in Stonehaven Sheriff Court.<sup>10</sup> The defender was prosecuted for employing children under twelve years of age to gather potatoes before 3.30 p.m. It was not denied that the employment was during school hours. The Sheriff held that, as it was not stated that the children were under ten, the complaint was irrelevant.

<sup>1</sup> Education (Scotland) Act, 1901 (1 Edw. VII. c. 9, s. 2), as amended by the Education (Scotland) Act, 1918 (8 & 9 Geo. V. c. 48), s. 14 (1).

<sup>2</sup> Education (Scotland) Act, 1878 (41 & 42 Vict. c. 78), s. 6.

<sup>3</sup> Employment of Children Act, 1903 (3 Edw. VII. c. 45), s. 3 (2).

<sup>4</sup> *Ibid.*, s. 13.

<sup>5</sup> Employment of Children Act, 1903 (3 Edw. VII. c. 45), ss. 3 (1) and 13, as amended by the Education (Scotland) Act, 1918 (8 & 9 Geo. V. c. 48), s. 16 (1).

<sup>6</sup> 1 Edw. VII. c. 22.

<sup>7</sup> Employment of Children Act, 1903 (3 Edw. VII. c. 45), ss. 3 (3), (4), and (5), and 13.

<sup>8</sup> 41 & 42 Vict. c. 78, s. 7.

<sup>9</sup> 1 Edw. VII. c. 9.

<sup>10</sup> *Marykirk School Board v. Robertson*, Feb. 1903 (not reported).

**663.** As regards both casual and non-casual employment, further provisions are made by the Employment of Women, Young Persons, and Children Act, 1920.<sup>1</sup> For the purposes of this Act a child is a person under fourteen, a young person is a person who has ceased to be a child and is under eighteen (s. 4). No child can be employed in any industrial undertaking or in any ship; and no young person can be employed at night in any industrial undertaking, except in the circumstances laid down in the schedule to the Act which describes in detail the meaning of industrial undertaking (s. 1). Registers must also be kept of young persons so employed, and must at all times be open to inspection. Penalties are imposed for failure (s. 1). The Act does not apply to industrial undertakings or ships in which members of the same family only are employed, nor to children lawfully employed at the commencement of the Act (1st January 1922); but the provisions of the Act are otherwise in addition to, and not in derogation of, any of the provisions of any other Acts restricting the employment of children and young persons (s. 3).

**664.** Under the Employment of Children Act, 1903,<sup>2</sup> provision is made for the passing of bye-laws by local authorities regarding the employment of children (ss. 1 and 2). Though the powers given are wide, the local authority has no power to restrict the prohibitions on employment laid down by the Education (Scotland) Act, 1878,<sup>3</sup> and the Education (Scotland) Act, 1901.<sup>4</sup> Section 14 (4) defines the term local authority. Bye-laws must be confirmed by the Secretary for Scotland after considering and, if necessary, inquiring into any objections which may be addressed to him on the subject (s. 4); all bye-laws must be communicated to the school boards concerned, and their observations thereon considered by the local authority (s. 4). It is to be noted that bye-laws made under this Act shall not apply to any child above twelve employed in pursuance of the Factory and Workshops Act, 1901,<sup>5</sup> or the Metalliferous Mines Regulation Act, 1872,<sup>6</sup> or the Coal Mines Regulation Act, 1887,<sup>7</sup> so far as regards that employment.<sup>8</sup>

## SECTION 2.—PENALTIES.

### SUBSECTION (1).—*Under Education Acts.*

**665.** Every person employing a child in contravention of the Education Acts is liable to a penalty not exceeding 40s.; and any parent who employs a child in any labour exercised by way of trade or for purposes of gain, or who permits such a child to be engaged in any such labour on its own behalf, shall be deemed to take such child into

<sup>1</sup> 10 & 11 Geo. V. c. 65.

<sup>2</sup> 3 Edw. VII. c. 45.

<sup>3</sup> 41 & 42 Vict. c. 78, s. 6.

<sup>4</sup> 1 Edw. VII. c. 9, s. 2; see s. 14 (7) of Employment of Children Act, 1903 (3 Edw. VII. c. 45).

<sup>5</sup> 1 Edw. VII. c. 22.

<sup>6</sup> 35 & 36 Vict. c. 77.

<sup>7</sup> 50 & 51 Vict. c. 58.

<sup>8</sup> Employment of Children Act, 1903 (3 Edw. VII. c. 45), s. 9.

his employment.<sup>1</sup> Opinions have been expressed to the effect that where a child has stated that he is over the statutory age, and his master has every reason to believe the statement to be correct, no offence is committed though in fact the child is under the statutory age.<sup>2</sup> It is the duty of the education authority to prosecute persons employing children in casual employment, and it is the duty of the inspectors acting under the Acts regulating employment in factories, workshops, mines, etc., to prosecute persons employing children in such places.<sup>3</sup> The Sheriff may empower any officer of the authority to enter any place where there is reasonable cause to believe that a child is employed in contravention of the Act.<sup>4</sup>

SUBSECTION (2).—*Under the Employment of Children Act.*

366. Contraventions of the Employment of Children Act, 1903,<sup>5</sup> or of any bye-law thereunder, involve liability to a fine not exceeding 40s. and in the case of a subsequent offence £5. Any parent or guardian (that is, any person liable to maintain or who has the actual custody of the child (s. 131)), conducting to the offence by wilful default or habitual neglect, is liable to the same fine. In lieu of ordering the child to be sent to an industrial school the Sheriff may order it to be taken out of the control of the person who has charge of it, and to be committed, up to the age of sixteen, to the charge and control of some fit person willing to undertake the same (s. 5).

367. Where the offence of employing children under this Act is in fact committed by an agent or workman of the employer, such agent or workman shall be liable to a penalty as if he were the employer. Where the child is employed contrary to this Act, on the production by, or with the privity of, the parent, of a false certificate, or on a false representation by the parent that the child is of an age at which such employment is not contrary to the Act, the parent is liable to a penalty not exceeding 40s. Where an employer is charged with an offence under this Act, he is entitled to have any other person, whom he charges as the actual offender, brought before the Court at the time appointed for hearing the charge, and if the Court is satisfied that the employer had used due diligence to comply with the Act, and that the other person had committed the offence in question, the other person shall be convicted of the offence.<sup>6</sup> With respect to summary proceedings for offences under this Act "the information shall be laid" within three months after the commission of the offence.<sup>7</sup> If it appear to any justice of the peace, on the complaint of an officer of the

<sup>1</sup> Education (Scotland) Act, 1878 (41 & 42 Vict. c. 78), ss. 8 and 9; and also Education (Scotland) Act, 1908 (8 Edw. VII. c. 63), ss. 9 and 10.

<sup>2</sup> *Carty v. Nichol*, 1878, 6 R. 194.

<sup>3</sup> Education (Scotland) Act, 1878 (41 & 42 Vict. c. 78), s. 10.

<sup>4</sup> *Ibid.*, s. 12.

<sup>6</sup> Children Act, 1903 (3 Edw. VII. c. 45), s. 6.

<sup>5</sup> 3 Edw. VII. c. 45, s. 5.

<sup>7</sup> *Ibid.*, s. 7.



local authority under this Act, that there is reasonable cause to believe that a child is employed contrary to this Act in any place, such justice may, by order under his hand, empower an officer of the local authority to enter such place at any reasonable time within forty-eight hours and examine such place and any person therein. Any person refusing admission or obstructing such officer is liable to a penalty not exceeding £20.

### SECTION 3.—PUBLIC ENTERTAINMENTS.

#### SUBSECTION (1).—*Generally.*

**668.** If any person (a) causes or procures any child, being a boy under the age of fourteen years, or being a girl under the age of sixteen years, or having the custody, charge, or care of any such child, allows that child to be in any street, or in any premises licensed for the sale of any intoxicating liquor, other than premises licensed according to law for public entertainments, for the purpose of singing, playing, or performing, or being exhibited for profit, or offering anything for sale between 9 p.m. and 6 a.m.; or (b) causes or procures any child under the age of eleven, or having the custody, charge, or care of any such child, allows that child to be at any time in any street or in any premises licensed for the sale of any intoxicating liquor, or in premises licensed according to law for public entertainments, or in any circus or other place of public amusement to which the public are admitted by payment, for the purpose of singing, playing, or performing, or being exhibited for profit, or offering anything for sale; or (c) causes or procures any child under the age of sixteen years, or, having the custody, charge, or care of any such child, allows that child to be in any place for the purpose of being trained as an acrobat, contortionist, or circus performer, or of being trained for any exhibition or performance which in its nature is dangerous, that person shall be liable to fine or imprisonment.<sup>1</sup> The section does not apply in the case of any occasional sale or entertainment the net proceeds of which are wholly applied for the benefit of any school or to any charitable object, if such sale or entertainment is held elsewhere than in premises which are licensed for the sale of any intoxicating liquor but not licensed according to law for public entertainments, or if, in the case of a sale or entertainment held in any such premises as aforesaid, a special exemption from the provisions of this section has been granted in writing under the hands of two justices of the peace.

**669.** Any local authority (that is, a county or town council as defined in s. 14 (4) of the Employment of Children Act, 1903<sup>2</sup>) may, if they think it necessary or desirable so to do, from time to time by bye-law extend or restrict the hours mentioned in paragraph (a) *supra*, either on every day or on any specified day or days of the week, and either as to the whole of their district or as to any specified area therein; and paragraphs (b) and (c) shall not apply in any case in respect of which

<sup>1</sup> Prevention of Cruelty to Children Act, 1904 (4 Edw. VII. c. 15), s. 2.

<sup>2</sup> 3 Edw. VII. c. 45.



a licence granted under this Act is in force, so far as that licence extends. Notwithstanding anything in the Prevention of Cruelty to Children Act, 1904,<sup>1</sup> or in the Employment of Children Act, 1903,<sup>2</sup> the education authority may "grant a licence for such time and during such hours of the day, and subject to such restrictions and conditions as they think fit, for any child exceeding ten years of age—(a) to take part in any entertainment or series of entertainments to take place in premises licensed according to law for public entertainments, or in any circus or other place of public amusement as aforesaid; or (b) to be trained as aforesaid; or (c) for both purposes, if satisfied of the fitness of the child for the purpose, and if it is shewn to their satisfaction that proper provision has been made to secure the health and kind treatment of the children taking part in the entertainment or series of entertainments, or being trained as aforesaid, and the authority may, upon sufficient cause, vary, add to, or rescind any such licence." It is the duty of inspectors and other officers charged with the execution of the Employment of Children Act, 1903,<sup>2</sup> to see whether the restrictions and conditions of any licence under this section are duly complied with. Any person applying for a licence under this section must give notice to the chief officer of police for the district, who may appear before the local authority and object. Nothing in ss. 2 or 3 shall affect the provisions of the Education Acts.<sup>3</sup>

#### SUBSECTION (2).—*Penalties.*

**670.** Any constable may take into custody without warrant any person who, within view of such constable, commits an offence under the Prevention of Cruelty to Children Act, 1904,<sup>1</sup> if the name and residence of such person are unknown to him, but such person may be released on bail, unless such release would tend to defeat the ends of justice or cause injury or danger to the child (s. 4). In any proceeding under the Act the person charged with an offence is "competent but not compellable to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case, and shall be competent but not compellable to give evidence" (s. 12). This provision as to evidence is similar to that contained in the Criminal Evidence Act, 1898. "Where a person is charged with an offence under this Act, or any offence under the Employment of Children Act, 1903,<sup>2</sup> in respect of a child who is alleged in the charge or indictment to be under any specified age, and the child appears to the Court to be under that age, such child shall, for the purposes of this Act and the Employment of Children Act, 1903,<sup>2</sup> be deemed to be under that age, unless the contrary is proved" (s. 17). This provision is similar to that contained in s. 123 of the Children Act, 1908.<sup>4</sup>

<sup>1</sup> Prevention of Cruelty to Children Act, 1904 (4 Edw. VII. c. 15), s. 2.

<sup>2</sup> 3 Edw. VII. c. 45.

<sup>3</sup> Prevention of Cruelty to Children Act, 1904 (4 Edw. VII. c. 15), s. 3.

<sup>4</sup> 8 Edw. VII. c. 67.

671. "Where a person is charged with committing an offence under this Act in respect of two or more children, the same information or summons may charge the offence in respect of all or any of them, but the person charged shall not be liable to a separate penalty for each child unless upon separate informations. A person shall not be summarily convicted of an offence under this Act unless the offence was wholly or partly committed within six months before the information was laid; but subject as aforesaid, evidence may be taken of acts constituting, or contributing to constitute, the offence, and committed at any previous time" (s. 18). Any bye-law under s. 2 (ii.) is to be made by the same authority as under s. 2 of the Employment of Children Act, 1903,<sup>1</sup> that is, by county and town councils (s. 22). Sec. 2, which deals with the employment of children, applies to "any person having the custody, charge, or care of any child." Accordingly s. 23 provides that "any person who is the parent of a child shall be presumed to have the custody of the child, and any person to whose charge a child is committed by its parent shall be presumed to have charge of the child; and any other person having actual possession or control of a child shall be presumed to have the care of the child," and the word "parent" applies to a step-parent and any person cohabiting with the parent of the child, and includes guardian and any person liable to maintain the child. The same summons may "charge any person as having the custody, charge, or care, alternatively or together" (s. 18 (2)). In any proceedings under the Act a copy of an entry in the wages book of any employer or, if none be kept, a written statement by the employer or his foreman shall be *prima facie* evidence that such wages were paid, provided that such copy or statement has been signed by the employer or his foreman, and that the signature has been witnessed by the person producing it (s. 24). "The limit of time mentioned in the second proviso of s. 5 of the Criminal Law Amendment Act, 1885, shall be six months after the commission of the offence" (s. 27).

#### SECTION 4.—FACTORIES AND WORKSHOPS.

##### SUBSECTION (1).—*Employment therein.*

672. The main enactment now in force is the Factory and Workshops Act, 1901.<sup>2</sup> For the purposes of this Act, child means a person under fourteen and who has, being the age of thirteen years, obtained exemption from the obligation to attend school in the manner prescribed by the Education Scotland Act, 1901.<sup>3</sup> Young person means a person who has ceased to be a child and is under the age of eighteen years (s. 156). Provision is made in s. 134 for the definite ascertainment of the child or young person's age.

673. No child or young person can be employed in a factory or workshop except during the periods of employment specified in the Act.

<sup>1</sup> 3 Edw. VII. c. 45.

<sup>2</sup> 1 Edw. VII. c. 22.

<sup>3</sup> 1 Edw. VII. c. 9, s. 3.

To employ a person contrary to the Act involves negligence, and injury in consequence of such employment gives rise to a claim for damages.<sup>1</sup> Secs. 24 to 48, 51, 52, and 111 give the hours of employment and the holidays in different kinds of factories and workshops, for which see under FACTORIES AND WORKSHOPS. Additional prohibitions against the employment of persons under eighteen in lead factories are contained in ss. 1, 2, 4, and 5 of the Women and Young Persons (Employment in Lead Processes) Act, 1920.<sup>2</sup> Certificates of fitness are required by children and young persons in factories and workshops in terms of s. 63.

#### SUBSECTION (2).—*Penalties.*

674. Fines are imposed on the occupiers of the factories and workshops (s. 137), and in certain circumstances on the parents (s. 138) of persons employed contrary to the provisions of the Act.

#### SUBSECTION (3).—*Education.*

675. Provision is made in ss. 68 to 72 for the attendance at school of children employed in a factory or workshop, with its consequent effect upon the employment of the children. The occupier of the factory or workshop must obtain a certificate of school attendance from the child's teacher (s. 69) and pay a sum for the child's schooling (s. 70). The intention of the section is that the employer should only be liable for such payments as the child or its parents could legally be compelled to make.<sup>3</sup> Provision is made for deduction from wages for such education<sup>4</sup> and for the audit of such deductions.<sup>5</sup> A fine is recoverable summarily from the parent of any child who neglects to cause that child to attend school in accordance with the Act.<sup>6</sup>

#### SECTION 5.—DANGEROUS PERFORMANCES.

676. The Children's Dangerous Performances Act, 1879,<sup>7</sup> as amended by the Dangerous Performances Act, 1897,<sup>8</sup> provides that any person who shall cause any male young person under the age of sixteen, or any female young person under the age of eighteen years, to take part in any public exhibition or performance whereby, in the opinion of a Court of summary jurisdiction, the life or limbs of such young person shall be endangered, and the parent or guardian, or any person having the custody, of such young person, who shall aid or abet the same, shall severally be guilty of an offence against the Acts, and shall on summary conviction be liable for each offence to a penalty not exceeding £10 (Act 1879, s. 3; Act 1897, s. 1). Where in the course of a public

<sup>1</sup> *Gibb v. Crombie*, 1875, 2 R. 886; *Sharp v. Pathhead Spinning Co. Ltd.*, 1885, 12 R. 574; *Morris v. Boase Spinning Co. Ltd.*, 1895, 22 R. 336.

<sup>2</sup> 10 & 11 Geo. V. c. 62.      <sup>3</sup> *Dundee School Board v. Gilroy, Sons & Co.*, 1899, 1 F. 909.

<sup>4</sup> Truck Act, 1887 (50 & 51 Vict. c. 46), s. 8.

<sup>5</sup> *Ibid.*, s. 9.

<sup>6</sup> Factory and Workshops Act, 1901 (1 Edw. VII. c. 22), ss. 138 and 144.

<sup>7</sup> 42 & 43 Vict. c. 34.

<sup>8</sup> 60 & 61 Vict. c. 52.



exhibition or performance, which in its nature is dangerous to the life or limb of such young person taking part therein, any accident causing actual bodily harm occurs to any such young person, the employer of such young person shall be liable to be indicted as having committed an assault; and the Court before whom such employer is convicted, on indictment, shall have the power of awarding compensation not exceeding £20 to be paid by such employer to the young person, or to some person named by the Court on behalf of the young person, for the bodily harm so occasioned; provided that no person shall be punished twice for the same offence (*ibid.*). When a person is charged with an offence against the Acts in respect of a child or young person who in the opinion of the Court trying the case is apparently of the age alleged by the informant (*sic*), the onus is on the accused to prove that the young person is not of that age (1879, s. 4). Except where an accident causing actual bodily harm occurs to any child or young person, no prosecution or other proceedings shall be instituted for an offence against the Acts without the consent in writing of the chief officer of police (within the meaning of the Police (Scotland) Act, 1890,<sup>1</sup> of the police area in which the offence is committed (1897, s. 2). Every offence against the Acts, in respect of which the person committing it is liable, as above mentioned, to a penalty not exceeding £10, is to be prosecuted, and the penalty recovered, with costs, in a summary manner, in accordance with the provisions of the Summary Procedure Act, 1864,<sup>2</sup> and of any Act or Acts amending the same (1879, s. 5).

## SECTION 6.—EMPLOYMENT IN MINES.

### SUBSECTION (1).—*Coal Mines.*

677. No boy under thirteen and no girl of any age shall be employed in any mine below ground.<sup>3</sup> No boy above thirteen may be employed underground for more than ten hours a day;<sup>4</sup> and no one may be employed underground for more than eight hours in any consecutive twenty-four hours.<sup>5</sup> As regards work above ground, no boy or girl under twelve shall be so employed.<sup>6</sup> For the regulation of hours and periods of work above ground for boys and girls of thirteen and over, see COAL MINES.

678. By s. 76 of the Coal Mines Regulation Act, 1887, it is provided that nothing in that Act is to affect the Education (Scotland) Acts. Accordingly, no child under fifteen can be employed at all in or about a mine unless he has been exempted from the obligation to attend school under s. 3 of the Education (Scotland) Act, 1901.<sup>7</sup> A register of

<sup>1</sup> 53 & 54 Vict. c. 67.

<sup>2</sup> 27 & 28 Vict. c. 53.

<sup>3</sup> Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 4, as amended by Mines (Prohibition of Child Labour Underground) Act, 1900 (63 & 64 Vict. c. 21), s. 1.

<sup>4</sup> 50 & 51 Vict. c. 58, s. 5, as amended by 63 & 64 Vict. c. 21, s. 1.

<sup>5</sup> Coal Mines Regulation Act, 1908 (8 Edw. VII. c. 57).

<sup>6</sup> Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 7.

<sup>7</sup> 1 Edw. VII. c. 9.



boys and girls employed in or at the mine must be kept by the manager, and the education officer is entitled to see it. In addition to the foregoing, no child under twelve can be employed in a mine at all.<sup>1</sup> No young person under eighteen can be employed in a mine except to the extent provided in Part II. of the schedule to the 1920 Act (s. 1 (3)), and registers of all such young persons must be kept.

#### SUBSECTION (2).—*Metalliferous Mines.*

671. The Metalliferous Mines Regulation Act, 1872,<sup>2</sup> applies to every mine other than a mine to which the Coal Mines Regulation Act, 1872,<sup>3</sup> applies. This statute, as amended by the Mines Prohibition of Employment Underground Act, 1900, enacts that no boy under thirteen and no girl of any age shall be employed underground. A boy between thirteen and sixteen shall not be employed for more than certain hours per day and per week (s. 5). As regards employment above ground, see under METALLIFEROUS MINES REGULATION ACT. These provisions regarding employment, both above and below ground, are subject to the restrictions on employment made by the Education (Scotland) Act, 1901,<sup>4</sup> as amended by the Education (Scotland) Act, 1918,<sup>5</sup> and by the Employment of Women, Young Persons, and Children Act, 1920,<sup>6</sup> which are referred to under Coal Mines in the preceding subsection.

#### SECTION 7.—CHIMNEY-SWEEPING.

680. Various statutes have been passed for the protection of chimney-sweepers' apprentices, the principal Act being an Act for the Regulation of Chimney Sweepers and Chimneys in 1840.<sup>7</sup> By s. 2, "any person who shall compel or knowingly allow any child or young person under the age of twenty-one years to ascend or descend a chimney, or enter a flue, for the purpose of sweeping, cleaning, or coring the same, or for extinguishing fire therein, shall be liable to a penalty not more than ten pounds [or less than five pounds]." The last five words within brackets are repealed by the Chimney Sweepers Regulation Act, 1864.<sup>8</sup> No child under sixteen years may be apprenticed to a chimney-sweeper (s. 3). These provisions were extended by the Act of 1864,<sup>8</sup> which restricted the employment of children under ten, and made it illegal for such to assist a chimney-sweeper in his trade or business outside of his house or place of business, or the yard or buildings connected therewith (s. 6). By s. 7 of this later Act, a chimney-sweeper entering a house or building to sweep chimneys, etc., is not allowed to bring with him persons under sixteen years of age. For either of these offences a penalty not exceeding £10 may be

<sup>1</sup> Employment of Women, Young Persons, and Children Act, 1920 (10 & 11 Geo. V. c. 65), s. 1 (1).

<sup>2</sup> 35 & 36 Vict. c. 77.

<sup>3</sup> 35 & 36 Vict. c. 76.

<sup>4</sup> 1 Edw. VII. c. 9.

<sup>5</sup> 8 & 9 Geo. V. c. 48.

<sup>6</sup> 10 & 11 Geo. V. c. 65.

<sup>7</sup> 3 & 4 Vict. c. 85.

<sup>8</sup> 27 & 28 Vict. c. 37, s. 11.

inflicted (s. 8). By the principal Act certain procedure is provided by which, after application by an apprentice to any justice of the peace having jurisdiction over the master's place of residence, such apprentice may be discharged.<sup>1</sup>

#### SECTION 8.—SHOPS.

##### SUBSECTION (1).—*Conditions of Employment.*

**681.** Under the Shops Act, 1912,<sup>2</sup> no young person who is not wholly employed as a domestic servant, and who is under eighteen, shall be employed in or about a shop, as defined by ss. 19 and 2 (5) of the Act, for a longer period than seventy-four hours including meal times in any one week (s. 2 (1) and (6)). Further, provisions are made regarding the employment in shops of such young persons who have been employed in a factory or workshop previously on the same day.<sup>3</sup> Provision is also made<sup>4</sup> for the posting up of notices in shops where young persons are employed.

##### SUBSECTION (2).—*Penalties.*

**682.** Contravention of any of these provisions is an offence, and makes the occupier liable to a fine<sup>5</sup> subject to certain qualifications specified.<sup>6</sup> The local authority, as defined by s. 20, has the duty of enforcing the provisions of the Act by summary prosecution (see ss. 13 and 14), and must appoint inspectors to see that the Act is observed (s. 13). Such inspectors have all the powers and duties (s. 13) of inspectors under the Factory and Workshops Act, 1901. For the general provisions affecting all shop employees, see under SHOPS.

### PART II.—CARE OF INFANTS AND YOUNG PERSONS.

#### SECTION 1.—INFANT LIFE PROTECTION.

##### SUBSECTION (1).—*Receiving Infants for Reward.*

**683.** Where a person undertakes for reward the nursing and maintenance of one or more infants under the age of seven, apart from their parents or having no parents, he shall within forty-eight hours from the reception of such infant give notice in writing thereof to the parish council (s. 1 (1) of the Children Act, 1908).<sup>7</sup> Notice of change of residence or the death of the infant must also be given by the person undertaking its nursing and maintenance (s. 1 (4) and (5)). Failure to supply such notice involves liability to imprisonment not exceeding six months or to a fine not exceeding £25, and if the consideration for

<sup>1</sup> 3 & 4 Vict. c. 85, s. 4.

<sup>2</sup> 2 Geo. V. c. 3.

<sup>3</sup> Shop Act, 1912 (2 Geo. V. c. 3), s. 2 (2); Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), ss. 24 to 48.

<sup>4</sup> Shop Act, 1912 (2 Geo. V. c. 3), s. 2 (3) and (6).

<sup>5</sup> *Ibid.*, s. 2 (4).

<sup>6</sup> *Ibid.*, s. 14 (2) and (3).

<sup>7</sup> 8 Edw. VII. c. 67.

maintenance of the infant is a lump sum, forfeiture of that sum, which may be applied for the benefit of the infant (s. 1 (7)).

SUBSECTION (2).—*Appointment and Powers of Inspectors.*

634. It is the duty of the parish council to make inquiry as to whether there are any persons in the parish undertaking such maintenance, and to appoint visitors who are to see that the infants are properly attended to (s. 2 (1) and (2)). Refusal to allow visitors to visit and examine infants is an offence (s. 2 (4)). If any person is suspected of keeping infants contrary to the Act, his premises may be searched (s. 2 (6)).

SUBSECTION (3).—*Restrictions on Persons receiving Infants.*

635. The local authority may fix the number of infants kept in any home. Any person keeping any infants in excess of such number is guilty of an offence (s. 4). The local authority may also order the removal of infants from the care of unfit persons or conditions. Refusal to comply with such order is an offence (s. 5).

SUBSECTION (4).—*Notice of Death and Insurance.*

636. Notice of the death of an infant is to be given to the Procurator-Fiscal. Failure to do so is an offence (s. 6). No person having charge of an infant within the meaning of this Act may insure its life, and both the person directly or indirectly attempting to insure and the company knowingly issuing or attempting to issue a policy on the infant's life are guilty of an offence (s. 7).

SUBSECTION (5).—*Punishment.*

637. Offences are punishable on summary conviction with imprisonment not exceeding six months or a fine not exceeding £25 (s. 9 (1)).

SUBSECTION (6).—*Exemptions.*

638. The Act does not extend to relatives or legal guardians of an infant nor to charitable institutions or boarding-schools (s. 11).

SECTION 2.—CRUELTY TO CHILDREN AND YOUNG PERSONS.

SUBSECTION (1).—*General.*

639. Every person who causes or permits the exposure of children of tender age to the inclemency of the weather, or causes children to sing in the streets, may be punished.<sup>1</sup> If any person of sixteen, who has

<sup>1</sup> Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), s. 408, and Local Government (Scotland) Act, 1908 (8 Edw. VII. c. 62), s. 10 (1).

the care of any child or young person under sixteen, " wilfully assaults, ill-treats, neglects, abandons, or exposes " such person in a manner likely to cause unnecessary suffering or injury to its health, he may be prosecuted on indictment or summarily. A conviction may be obtained though the likelihood of suffering or injury to health was obviated by another.<sup>1</sup> But if the person convicted was interested in the death of the young person the punishment may be increased (s. 12 (5) and (6)). A person legally liable to maintain a child or young person shall be deemed to have neglected him if he fails to provide adequate food, clothing, medical aid, or lodging ; or, if being otherwise unable to do so, he fails to take steps to procure the same (s. 12 (1)).

690. Where it is proved that the death of an infant under three years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air-passages of the infant) while the infant was in bed with some other person over sixteen years of age, and that that other person was at the time of going to bed under the influence of drink, that other person shall be deemed to have neglected the infant in a manner likely to cause injury to its health within the meaning of this part of the Act (s. 13).

691. In addition to the provisions of the Children Act, anyone who deserts or neglects to maintain his child when able to do so is punishable under s. 80 of the Poor Law (Scotland) Act, 1845.<sup>2</sup> What amounts to desertion is a question of fact.<sup>3</sup>

#### SUBSECTION (2).—*Begging.*

692. Any person who causes or procures any young person under sixteen, or having the care of the young person, allows him to go anywhere for the purpose of begging may be punished. It is enough to prove commission of the offence if the young person is proved to have been at the place for the purpose of begging, and the person having the care of that young person allowed him to go there. The punishment is, on summary conviction, a fine not exceeding £25, with an additional or alternative imprisonment up to three months (s. 14).

#### SUBSECTION (3).—*Burning.*

693. Any person over sixteen, with the care of a child under seven, who allows the child to be in any room containing an open fire grate not sufficiently protected to guard against the risk of a child being burnt or scalded, without taking reasonable precautions against that risk, and the child suffers serious injury thereby, shall be liable to a fine not exceeding £10 (s. 15).

<sup>1</sup> Children Act, 1908 (8 Edw. VII. c. 67), s. 12 (1) and (2); sec. 12 (1) details the penalties.

<sup>2</sup> 8 & 9 Vict. c. 83.

<sup>3</sup> *Motion v. M'Fall*, 1899, 1 F. (J.) 85.



SUBSECTION (4).—*Brothels.*

694. Anyone having the charge of a child between four and sixteen who allows it to reside in or frequent a brothel shall be liable to a fine of £25 or imprisonment not exceeding six months (s. 16). Also anyone having the charge of a girl under sixteen, who causes or encourages her seduction or prostitution, is liable to imprisonment up to two years (s. 17). A parent or guardian may be bound over to exercise due care of a girl under sixteen who is exposed to seduction or prostitution (s. 18).

## SECTION 3.—PROVISIONS FOR SAFETY OF CHILDREN.

SUBSECTION (1).—*Treatment of Offenders.*

695. Provision is made by s. 19 for the arrest without warrant of offenders against the provisions of the Children Act, 1908. Persons so arrested may be let out on bail (s. 19). A person convicted of an offence who is an habitual drunkard within the meaning of the Inebriates Acts, 1879 to 1900, may be confined in a retreat established under these Acts. No provision, however, is made for paying expenses in such a retreat.

SUBSECTION (2).—*Detention of Child.*

696. Provision is also made for the removal of a child by a constable, where an offence is believed to have been committed (s. 20 (1)), for its detention (s. 20 (2) and (3)), and for the ultimate disposal of the child by order of the Court (s. 21). Religion is an important element in the selection of the person to whom the child is to be entrusted (s. 23). Powers are conferred upon the Court over persons to whom such children have been entrusted, and the parents are bound to contribute to the child's maintenance (s. 22). Inspectors are appointed to visit and report upon the condition of the homes found for the children (s. 25). Warrants to search for or remove children or young persons are competent in the circumstances described at length in s. 24.

## SECTION 4.—EVIDENCE AND PROCEDURE.

697. Proceedings for offences under Part II. or Schedule I. of the Children Act, 1908,<sup>1</sup> are governed by the provisions of the Criminal Evidence Act, 1898.<sup>2</sup> Hence a wife is a competent witness in such proceedings against her husband.<sup>3</sup> Where attendance before a Court would involve serious danger to the life or health of a young person or child, his evidence may be taken by deposition in writing (ss. 28 and 29). An oath need not be administered to a child of tender age (s. 30), and the child need not necessarily be present at the hearing (s. 31). Further

<sup>1</sup> 8 Edw. VII. c. 67.

<sup>2</sup> 61 & 62 Vict. c. 36, s. 27.

<sup>3</sup> *H.M. Advocate v. Fraser*, 1901, 3 F. (J.) 67.

miscellaneous details in procedure are given in ss. 32 to 38, 114 and 115.

#### SECTION 5.—OTHER OFFENCES.

##### SUBSECTION (1).—*General.*

698. In addition to the foregoing provisions intended directly to prevent cruelty, attempts have been made to restrict as far as possible the temptations open to children and young persons. The following are briefly the directions in which these attempts have proceeded.

##### SUBSECTION (2).—*Sale of Intoxicating Liquors.*

699. Any person giving to a child under five any intoxicating liquor, with certain special exceptions, is liable to a fine not exceeding £3 (s. 119). Further provision is made against the sale of certain intoxicating liquors to persons under fourteen in the Intoxicating Liquors (Sale to Children) Act, 1901.<sup>1</sup> A licence holder who allows a child under fourteen to be in the bar of licensed premises, except during the hours of closing, is liable to a fine not exceeding 40s.<sup>2</sup> Observations on the meaning of “bar” will be found in *Donaghue v. M'Intyre*.<sup>3</sup>

##### SUBSECTION (3).—*Sale of Old Metal.*

700. It is an offence for a dealer in old metal, as defined by the Prevention of Crimes Act, 1871,<sup>4</sup> or a marine store dealer, within the meaning of Part IX. of the Merchant Shipping Act, 1894,<sup>5</sup> to purchase any old metal from any person apparently under sixteen (s. 116).

##### SUBSECTION (4).—*Juvenile Smoking.*

701. It is an offence to sell any cigarettes or cigarette papers to anyone under sixteen, whether for his own use or not (s. 39). Uniformed constables or park keepers may seize cigarettes found in the possession of persons apparently under sixteen (s. 40). If any automatic machine for the sale of cigarettes is being extensively used by persons under sixteen, the Court may order the machine to be removed (s. 41). The word cigarette is defined in s. 43. These provisions do not apply to persons employed in a trade (s. 42).

##### SUBSECTION (5).—*Betting and Pawning.*

702. It is an offence to send a document inciting a minor or pupil to bet.<sup>6</sup> Similarly, a circular inciting a pupil or minor to borrow money is an offence,<sup>7</sup> and to solicit a minor or pupil to make an affidavit in

<sup>1</sup> 1 Edw. VII. c. 27, ss. 2, 3, and 5.

<sup>2</sup> Children Act, 1908 (8 Edw. VII. c. 67), s. 120.

<sup>3</sup> 1911 S.C. (J.) 61.

<sup>4</sup> 34 & 35 Vict. c. 112.

<sup>5</sup> 57 & 58 Vict. c. 60.

<sup>6</sup> Betting Loans Infants Act, 1892 (55 & 56 Vict. c. 4), ss. 1 and 7.

<sup>7</sup> *Ibid.*, ss. 2 and 7.

connection with a loan is punishable.<sup>1</sup> Any young person found begging or sent or suffered to go for that purpose may be brought before a magistrate, and the parents of such young person or those in whose control he is, and those who sent him to beg may be apprehended and punished.<sup>2</sup> Any pawnbroker who takes an article in pawn from anyone apparently under fourteen is guilty of an offence.<sup>3</sup>

SUBSECTION (6).—*Miscellaneous.*

703. Provision is also made by the Children Act to prevent the overcrowding of children at entertainments (s. 121), for the cleansing of verminous children (s. 122), for their exclusion from criminal courts (ss. 114 and 115), and for their education when born of wandering parents (s. 118).

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<sup>1</sup> Betting Loans Infants Act, 1892 (55 & 56 Vict. c. 4), s. 4.

<sup>2</sup> Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), s. 410, and Local Government (Scotland) Act, 1908 (8 Edw. VII. c. 67), s. 10 (1).

<sup>3</sup> See Children Act, 1908 (8 Edw. VII. c. 67), s. 117, and Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 32 (1).

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## CHILTERN HUNDREDS.

*See* PARLIAMENT.

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## CHIMNEY SWEEPERS.

*See* CHILDREN AND YOUNG PERSONS.

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## CHOOSING CURATORS.

*See* TUTORS AND CURATORS.

# CHURCH

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## PART I.—THE CHURCH OF SCOTLAND.

## SECTION 1.—INTRODUCTION.

**704.** The introduction of Christianity into Scotland has been attributed to the arrival of St. Ninian from Rome about the year 397, from which time the Church slowly took its rise. It was first called "The Scottish Church" about 878–89.<sup>1</sup> The Church had a measure of independence, sometimes successfully resisting the orders of the Pope. But the clergy were not permitted to escape from the assessment under Boidmonts Roll in 1275, which was ordered by Pope Gregory X. for the relief of the Holy Land.<sup>2</sup> Dealings with Rome were sometimes prohibited by Act of Parliament;<sup>3</sup> and Forbes states<sup>4</sup> that after the Pope had begun to claim first-fruits, "they could not be exacted in Scotland without the King's consent, who got the fifth penny." The Scottish clergy prepared canons for the regulation of their affairs, which continued in force till after the Reformation.<sup>5</sup> The canons, so far as now extant, have been carefully edited by Dr. Joseph Robertson.<sup>6</sup>

**705.** The causes which led to the Reformation need not here be traced. In 1560 the Lords of the Congregation passed an Act abolishing the authority and jurisdiction of the Pope.<sup>7</sup> That Act, against which several defects have been alleged, was confirmed by various Acts passed in 1567, and Presbytery then became the form of Church government in Scotland. The superintendents employed had not episcopal authority.

**706.** The Church continued Presbyterian till 1584, when Episcopacy was established by what have been popularly called "The Black Acts" of that year. Presbytery was, however, again restored by Act 1592, c. 116,<sup>8</sup> often referred to by Presbyterians as "The Charter of the Church." When the Act of 1587 was passed, King James VI. had meditated the continuance of Episcopacy;<sup>9</sup> and though it was interrupted in 1592, he succeeded in having bishops restored in 1608, after his accession to the English throne. Bishops held office in the Church from that time till 1637, when Episcopacy was again interrupted. The Church continued Presbyterian during the remainder of the reign of King Charles I., and throughout the Commonwealth. Following the restoration of King Charles II., Episcopacy was restored in 1662, and had an unpopular existence until after the Revolution Settlement of 1688, when, in accordance with a Claim of Right passed by the Estates, April 11, 1689, Presbytery was restored by the Act 1690, c. 7, which ratified the Act 1592, except as regarded patronage. Before the Union with England,

<sup>1</sup> Dr. Campbell in *Church of Scotland, Past and Present*, edited by Professor Story, i. 238.

<sup>2</sup> Hailes, *Annals*, 1797 ed., i. 199.

<sup>3</sup> See Thomson, *Acts*, *voce* Church.

<sup>4</sup> P. 132.

<sup>5</sup> Hailes, iii. 145 and 198.

<sup>6</sup> *Statuta, Ecclesiæ Scoticanæ*; see also Church in Skene's *Celtic Scotland*, ii.

<sup>7</sup> Thomson, *Acts*, ii. 526.

<sup>8</sup> Thomson, c. 8.

<sup>9</sup> Kames, *Statute Law*, 432.

an Act of Security for the maintenance of the Presbyterian Church was passed in the Scottish Parliament,<sup>1</sup> and that Act was afterwards ratified by Act of the English Parliament,<sup>2</sup> which declared that "the establishment therein contained shall be held and observed in all time coming as a fundamental and essential condition of any treaty or union to be concluded betwixt the two kingdoms." In recent times the Belhaven Act<sup>3</sup> has conferred certain special powers for administrative purposes on the Presbyterian Church.

**707.** Patronage, which had been in existence at the Reformation,<sup>4</sup> continued, with some interruptions, after it, and was the fruitful source of trouble and secession, including the great secession of 1843.<sup>5</sup> When patronage was temporarily abolished by Act 1690, c. 23, patrons were granted certain teinds, *i.e.* they were made titulars *qua* patrons, as had been done by the Act 1649, c. 39; but when patronage was restored in 1711, patrons were left in possession of both teinds and patronage. Patronage was not got rid of till 1874, when it was abolished on certain terms.<sup>6</sup> The appointment of ministers to vacant churches and parishes is now made by the people, under Regulations of the General Assembly.

## SECTION 2.—CHURCH COURTS.

### SUBSECTION (1).—*Constitution.*

**708.** The constitution and powers of the Courts of the Church of Scotland are founded upon the Act of 1592, c. 116, which established the Church with its Presbyterian form of Church government. The Act ratified all liberties and privileges previously granted to the Church, and confirmed all Acts of Parliament in its favour, and it then proceeds to declare as follows:—"And siclyk ratifies and appreis the Generall Assemblies appoyntit be the said Kirk, and declaris, that it sall be lauchfull to the Kirk and ministrie everilk yeir, at the leist, and offer *pro re nata*, as occasioun and necessitie sall require, to hald and keip Generall Assemblies: Providing that the Kingis Majestie, or his Commissioner with thame to be appoyntit be his Hienes, be present at ilk Generall Assemblie, befor the dissolving thair of, nominat and appoynt tyme and place quhen and quhair the nixt Generall Assemblie salbe haldin; and in caise nather his Majestie, nor his said Commissioner, beis present for the tyme in that toun quhair the said Generall Assemblie beis halden, than and, in that caise, it salbe lesum to the said Generall Assemblie, be themselfis, to nominat and appoynt tyme and place quhair the nixt Generall Assemblie of the Kirk salbe keipit and haldin, as they haif bene in use to do thir tymes bypast; And als ratifies and appreis the Sinodall and Provinciall Assemblies, to be haldin be the said Kirk and Ministrie, twyise ilk yeir, as they haif been, and ar

<sup>1</sup> 1707, c. 7.

<sup>2</sup> 6 Anne, c. 11, s. 2.

<sup>3</sup> 26 & 27 Vict. c. 47.

<sup>4</sup> Forbes, 57.

<sup>5</sup> See *Stewarton* case, 20th Jan. 1843, and authorities referred to in that volume.

<sup>6</sup> Act 37 & 38 Vict. c. 82.

presentlie in use to do, within every Province of this realme; And ratifeis and apprevis the Presbyteries and particulare Sessionis, appoyntit be the said Kirk, with the haill jurisdictioun and discipline of the same Kirk, aggreit upon be his Majestie, in Conference had be his Hienes with certane of the Ministrie, convenit to that effect, of the quhilkis articles the tenour followis: Materis to be intreatit in Provinciall Assemblies: Thir Assemblies ar constitute for wechtie materis, necessar to be intreatit be mutuall consent, and assistance of brethrene, within the Province, as neid requyris. This Assemblie hes power to handle, ordour and redresse, all things omittit or done amiss in the particulare Assemblies. It hes power to depose the office beraris of that Province, for gude and just causeis, deserving deprivation: And generallie, thir Assemblies hes the haill power of the particulare Elderschippis quhairof they ar collectit. Materis to be intreatit in the Presbyteries, the power of the Presbyteries is to give diligent labouris in the boundis committit to their charge, that the kirkis be kept in good ordour, to enquire diligentlie of nauchtie and ungodly personis, and to travell to bring thame in the way agane be admonitioun, or threatening of Goddis jugementis, or be correctioun. It appertenis to the Elderschip, to tak heid that the word of God be puirlye preachit within thair boundis, the Sacramentis richtlie ministrat, the Discipline intertenyit, and the ecclesiasticall guidis uncorruptlie distributit. It belangis to this kind of Assemblies, to caus the ordinances maid be the Assemblies, Provinciallis, Nationallis, and Generallis, to be kept and put in executioun, to mak constitutionis quhilkis concernis το πρεπον in the Kirk, for decent ordour, in the particulare Kirk quhair they governe: Provyding that they alter na rewlis maid be the Provinciall or Generall Assemblies; and that they mak the Provinciall Assemblies forsaidis privie of the rewlis that they sall mak, and to abolish constitutionis tending to the hurte of the same: It hes power to excommunicat the obstinat, formale process being led, and dew intervall of tymes observit. Anent particulare Kirkis. Gif they be lawfully rewlit be sufficient ministeris and session, Thay haif power and jurisdictioun in thair awin Congregatioun, in matteris ecclesiasticall. And decernis and declaris the saidis Assemblies, Presbyteries and Sessiounes, Jurisdictioun and Discipline thairof fairsaid, to be in all tymes cuming, maist just, gude and godlie in theself, notwithstanding of quhatsumevir Statutis, Actis, Canon, Civile or Municipall Lawes, maid in the contrair; to the quhilkis and every one of thame, this presentis sall mak express dirogatioun."

**709.** This Act of the Scottish Parliament was confirmed at the Revolution Settlement by the Act 1690, c. 7, which was itself ratified by the Act of Security. This latter Act is inserted verbatim in the Treaty of Union with England in 1707, and declared to be "a fundamental and essential condition" of the Union in all time coming. In further security of the rights and privileges thus conferred upon the Church, the Sovereigns of Great Britain, at their accession to the throne, take an oath that they will inviolably maintain the government, worship, discipline, rights,



and privileges of the Church as laid down in these solemn statutory enactments.

SUBSECTION (2).—*Recent Legislation.*

710. The Act of 1690, above referred to, ratified and established the Westminster Confession of Faith "as the public and avowed Confession of this Church, containing the summe and substance of the doctrine of the Reformed Churches." An Act of 1693 c. 38 enacted that no person be admitted or continued as a minister or preacher within the Church unless he "do also subscribe the Confession of Faith," "declaring the same to be the confession of his faith, and that he ownes the doctrine therein contained to be the true doctrine which he will constantly adhere to." However, by the Churches (Scotland) Act, 1905,<sup>1</sup> it was provided that the formula of subscription by ministers to the Confession of Faith "shall be such as may be prescribed by Act of the General Assembly" with the consent of Presbyteries. Further the Church of Scotland Act, 1921, while affirming the Westminster Confession as the principal subordinate standard of the Church of Scotland,<sup>2</sup> declares the right of the Church, "free from interference by civil authority," "to frame or adopt its subordinate standards, to declare the sense in which it understands its Confession of Faith, to modify the forms of expression therein, or to formulate other doctrinal statements, and to define the relation thereto of its office-bearers and members."<sup>3</sup> This Act also declares the power of the Church "to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church, including the right to determine all questions concerning membership and office in the Church, the constitution and membership of its Courts," etc.<sup>4</sup> The right of the Church is also affirmed to unite without loss of its identity on terms which it finds consistent with the articles sanctioned by this Act with any other Church "in which it finds the Word to be purely preached, the sacraments administered according to Christ's ordinance, and discipline rightly exercised."<sup>5</sup>

SUBSECTION (3).—*Jurisdiction.*

711. The Church Courts have accordingly been possessed since the Act of 1592 of a statutory jurisdiction, in matters spiritual and ecclesiastical, which is quite independent of the Civil Courts of the realm; and with which, so long as they confine themselves to matters falling within the sphere of their exclusive jurisdiction, the Civil Courts will in no way interfere. In this sphere they are supreme, just as the Court of Session and the High Court of Justiciary are supreme within their respective jurisdictions. This has been the subject of frequent decision and may be held as settled law. In *Lockhart v. Presbytery of Deer* <sup>6</sup> a minister, who

<sup>1</sup> 5 Edw. VII. c. 12, s. 5.

<sup>2</sup> *Ibid.*, Sched. Art. V.

<sup>3</sup> *Ibid.*, Sched. Art. VII.

<sup>4</sup> 11 & 12 Geo. V. c. 29, s. 1, Sched. Art. II.

<sup>5</sup> *Ibid.*, Sched. Art. IV.

<sup>6</sup> 1851, 13 D. 1296.



had been deposed by the General Assembly on the ground of immoral conduct, presented a note of suspension of the sentence in the Court of Session, on the grounds that the libel on which the sentence proceeded was defective in the instance, that evidence had been improperly rejected, and that the procedure before the Presbytery had been irregular and oppressive. The Court held that the offences were proper for the cognisance of the Church Court, and that the Civil Court had no right either to control the Church Courts in their procedure, or to review the sentence on its merits. The judgment of Lord President Boyle contains the following passage, which precisely states the law on the subject: "Although we may form a different opinion in regard to matter of form or even of substantial justice, in my opinion we cannot interfere to quash the sentence. . . . We have just as little right to interfere with the procedure of the Church Courts in matters of ecclesiastical discipline as we have to interfere with the proceedings of the Court of Justiciary in a criminal question." So, too, in *Wight v. Presbytery of Dunkeld*,<sup>1</sup> where a minister presented a note of suspension of a judgment of the General Assembly, complaining of the procedure in the Church Courts, Lord Justice-Clerk Moncreiff thus laid down the law relating to the jurisdiction of the Church Courts: "The jurisdiction of the Church Courts, as recognised judicatories of this realm, rests on a similar statutory foundation to that under which we administer justice within these walls. It is easy to suggest extravagant instances of excess of power: but quite as easy to do so in regard to the one jurisdiction as to the other. Within their spiritual province the Church Courts are as supreme as we are within the civil; and as this is a matter relating to the discipline of the Church and solely within the cognisance of the Church Courts, I think we have no power whatever to interfere."

712. It has been decided that no action of damages will lie against a Church Court of the Established Church for any sentence or judgment pronounced in a proper case of discipline duly brought before them, regularly conducted, and within their competency and province as a Church Court, even though it be averred that the judgment was pronounced maliciously and without probable cause; but this will not apply to a sentence or judgment of a Church Court in excess of its jurisdiction, or whereby it refuses to exercise powers conferred upon it by law. In such a case it would be open to the Civil Court to reduce the sentence and award damages to the aggrieved person.<sup>2</sup>

713. The assistance of the Sheriff as Judge Ordinary may be obtained by the Church Courts for the purpose of citing witnesses to attend and give evidence, where they have failed to obey the citation of the Church Courts. "Whenever the Church Courts are unable of themselves to carry out their own orders made to explicate their own jurisdiction, the Civil Courts are bound to step in and give 'all due assistance.'"<sup>3</sup>

<sup>1</sup> 1870, 8 M. 921.

<sup>2</sup> *Sturrock v. Greig*, 3rd July 1849, 11 D. 1220.

<sup>3</sup> *Presbytery of Lews v. Fraser*, 1874, 1 R. 888, per Lord Pres. Inglis.

714. By the Church Patronage Act, 1874,<sup>1</sup> the right of electing and appointing ministers is vested in the congregations of the Church, and the Church Courts are "declared to have the right to decide finally and conclusively upon the appointment, admission, and settlement" of the minister; but it is provided that if no appointment shall be made by the congregation within six months, the right of appointment shall accrue to the Presbytery *tanquam jure devoluto*. Shortly after the passing of the Act, the question was raised whether it was within the province of the Church Courts or of the Civil Courts to decide whether, in any particular case, the right of appointment had accrued to the Presbytery, or still belonged to the congregation. It was held that the rights of the congregation and those of the Presbytery, being legal rights depending upon Statute, their enforcement or a challenge of their validity in any particular case could only be tried in the tribunal appointed to interpret the Statutes of the realm, that is, the Supreme Civil Court, unless the Legislature had in very clear terms conferred the jurisdiction upon another tribunal, which, having regard to the terms of the Statute, had not been done. To the Church Courts has been committed the duty of deciding whether an election of a minister has been duly made, and their decision will be accepted by the Civil Court; but the consequences of the decision, and the question whether the right to elect has passed from the congregation to the Presbytery, depend upon the construction of the Statute, which falls to be interpreted by the Supreme Civil Court.<sup>2</sup>

#### SUBSECTION (4).—*Voluntary Churches.*

715. The Church Courts of the Voluntary Churches possess no jurisdiction in the proper legal sense of the term. Accordingly, in the *Cardross* case, where a minister of the Free Church of Scotland, who had been deposed because he had applied to the Civil Court for interdict against a sentence of suspension by the General Assembly of that body, brought actions of reduction of both sentences, and of damages against the General Assembly, alleging that the sentence of deposition "was a gross and flagrant violation of the contract or compact and rules of the Association under which the pursuer held his office and emoluments as Free Church minister," the Court held that it was necessary to examine the contract in order to see whether by it the pursuer had precluded himself from seeking redress, and that it was also necessary to examine the sentence to see whether it fell under the contract.<sup>3</sup> The tribunals of the Voluntary Churches are not Courts of Law, and they possess no jurisdiction and authority, except such as is conferred by their constitutions and the voluntary adherence of their members. Their decisions, there-

<sup>1</sup> 37 & 38 Vict., c. 82.

<sup>2</sup> *Stewart v. Presbytery of Paisley*, 1878, 6 R. 178; *Cassie v. General Assembly of the Church of Scotland*, 1878, 6 R. 221.

<sup>3</sup> *M'Millan v. General Assembly of the Free Church of Scotland*, 1859, 22 D. 290, and 1861, 23 D. 1314.

fore, cannot be defended as beyond challenge upon the ground that they are the decisions of a Spiritual Court; but, on the other hand, they will only be reviewed in so far as they affect civil rights. In the case of *Skerret v. Oliver*<sup>1</sup> the following passage occurs in the opinion of Lord Pres. Robertson: "Courts of Law, as I understand, take no concern with the resolutions of voluntary associations, except in so far as they affect civil rights. If a man says merely, 'Such and such a resolution of an ecclesiastical body is a violation of its constitution, on the faith of which I became a member or a minister,' and stops there, the Court will have nothing to do with his case, and will not declare the illegality or reduce the resolution. But if the same man says, 'I have been ejected from a house, or have been deprived of a lucrative office, under colour of this illegal resolution, and I ask possession of the house, or I ask £500 of damages,' then the Court will consider and determine the legality of the resolution, on its way to the disposal of the demand for practical remedy. There is there a specific claim of a specific remedy for invasion of patrimonial rights. If and in so far as a decree of reduction may be necessary to effectuating such remedy, the Court will pronounce it."

#### SUBSECTION (5).—*The Courts of the Church.*

**716.** The Courts of the Church are the Kirk-Session, the Presbytery, the Synod, and the General Assembly.

##### (i) *The Kirk-Session.*

**717.** The Kirk-Session, which is the lowest of the Church judicatories, is composed of the minister and elders of the parish. It exercises a general supervision over matters ecclesiastical, other than those which fall within the province of the minister alone; settles the time for the administration of the ordinances and sacraments of religion; admits to membership of the Church; and grants certificates of Church membership to persons leaving the parish. It further has the power of exercising discipline and imposing Church censures upon persons accused of scandalous offences against morality and the laws of the Church, but this is exercised much more sparingly now than formerly. The minister of the parish is, *ex officio*, moderator of the Kirk-Session, and, as such, he has no deliberative, but only a casting vote. It is his duty to call the meetings of Kirk-Session, to open and close them with prayer, to preside over them, and to rule upon points of order as these may arise. In the event of a vacancy, the Presbytery appoints one of its own number to act as moderator. Two elders and the minister form a quorum of the Kirk-Session, and where the number of elders falls below two, so that it cannot be properly constituted, the Presbytery, when necessary, appoints one or more of its own

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<sup>1</sup> 1896, 23 R. 468.



number, not necessarily ministers, to act as assessors. The clerk to the Kirk-Session may be either one of themselves or an outsider.

**718.** In order to make a person eligible for the eldership, he must be twenty-one years of age, and in full communion with the congregation. If he does not live in the parish, he must either reside in it for six weeks annually, or be a heritor, paying stipend and other parish burdens, or heir-apparent of such a heritor, or have been for twelve months a communicant in the Church of Scotland, consent being obtained to his nomination from the Kirk-Session of the parish in which he resides. The election is made by the Kirk-Session, after an opportunity has been given to the members of the congregation to state objections to the persons proposed. When once elected and admitted, an elder can only be removed from office by resignation or formal deposition after due process of law. The term "ordination" is very generally applied to the admission of elders. But its accuracy is disputed. There is no imposition of hands, and "orders" do not pass down through elders to ministers. Clerical members of Presbytery alone lay their hands on those who are ordained as ministers. A libel against an elder proceeds, in the first instance, before the Kirk-Session of which he is an elder, with the right of appeal to the superior Courts of the Church. At admission elders sign the formula, as regulated by the Act of Assembly, 1889, XVII., approving of the Confession of Faith, as approved of by the Church and ratified by law in the year 1690, and they further promise to submit themselves to the discipline and Presbyterian government of the Church, as established by law, and that they will never endeavour, directly or indirectly, the prejudice or subversion thereof. Subscription, in the case of elders, is not required by civil Statute, but rests upon acts of the General Assembly.

**719.** The following records are ordered to be kept by the Kirk-Session, and annually submitted to the Presbytery for revision, namely, Record of Proceedings, Communion Roll, Register of Baptisms, and Register of Proclamation of Banns.

### (ii) *The Presbytery.*

**720.** The Presbytery consists of the ministers of all the parishes within its bounds, the Professors of Divinity of any university within its bounds, provided they be ministers, and an elder commissioned from each Kirk-Session. An assistant and successor has a seat in the absence of his principal. One of the ministers acts as moderator, and it is the practice to elect him for six months. The functions of the Presbytery are thus described by Dr. Cook in his book upon the Practice of the Church of Scotland: "The business of Presbyteries is to examine students of divinity and license them to preach the Gospel; to take trial of presentees to parishes, and, if they find them qualified, to ordain them to the ministry, and grant them induction; to see that the word is preached, divine ordinances regularly dispensed, and the various duties of the ministry discharged within the bounds:



to take cognisance of the conduct of each minister, and in the event of any charge being made involving censure, suspension or deposition from his office, to libel the person accused, to take evidence, to judge of the same, and pronounce sentence accordingly. It is their duty to judge of all complaints, appeals, and references which may come from an inferior Court. And, as a Civil Court, it belongs to them to judge and determine, in the first instance, all matters connected with glebes, and the erection or repair of churches and manses."

**721.** Presbyteries, of which there are at present eighty-four (with parishes varying in number from ninety-eight to five), have a general duty of superintendence over the parishes within their bounds; and it belongs to them to regulate matters concerning the performance of public worship and administration of ordinances according to the laws of the Church. They can also maintain an action in the Civil Courts in regard to the funds or property of the Church, and they have a right and title to insist that churches and chapels in connection with the Church within their bounds shall be used for the purpose for which they were erected, and to enforce the observance of the constitutions which may have been granted to them by the General Assembly.<sup>1</sup> Processes against a minister begin in the Presbytery to which he belongs, and may proceed at the instance either of the Presbytery or of individual parishioners. Every Presbytery is bound to keep a separate register of facts necessary for the administration of the Widows' Fund, and a Benefice Register, containing information as regards the stipends and all funds administered by the Kirk-Sessions within its bounds. The Presbytery of Edinburgh has jurisdiction over the Presbyterian ministers in the establishment of the Government of India.<sup>2</sup>

### (iii) *The Synod.*

**722.** The Synod is the intermediate Court between the Presbytery and the General Assembly, and consists of the members of the several Presbyteries within its bounds. It usually meets twice a year for the purpose of hearing appeals and complaints against decisions of the inferior Courts, and generally reviews their proceedings by examining their minutes, and otherwise. No appeal can be taken from the Presbytery direct to the General Assembly, unless express instructions have been given to that effect in any particular case, or unless there is no intervening meeting of Synod between the decision of the Presbytery and the meeting of General Assembly. There are sixteen Synods in the Church, one of which contains three Presbyteries, these having nineteen parishes, and another eight Presbyteries with upwards of three hundred parishes. The Synod has no legislative power, but it is competent for it, as it is for a Presbytery, to transmit an overture on any subject to the Supreme Court.

<sup>1</sup> *Presbytery of Fordyce v. Shanks*, 1849, 11 D. 1361.

<sup>2</sup> 3 & 4 Will. IV. c. 85, s. 102.

(iv) *The General Assembly.*

**723.** The General Assembly is the Supreme Court of the Church, and consists of ministers and elders elected by Presbyteries, Universities, and Royal Burghs, and by the Church in India. The commissioners from Presbyteries are in proportion to the membership of the Presbyteries, and according to the rule laid down by the General Assembly of 1893, each Presbytery sends one minister for every four on the complete roll of the Presbytery, and for a part of four; and one elder for every six ministers and part of six on the roll. Each of the four Universities sends one commissioner, the City of Edinburgh two, and sixty-nine royal burghs one each. The result is, if the elections are fully made, an Assembly of seven hundred and thirty-five, comprising three hundred and eighty-eight ministers, and three hundred and forty-seven elders. In the case of burghs the election is made by the town council, and it is the practice to sustain the commissions of elders who have been elected by a minority of the council, on the ground that the right to elect is a public trust which the majority are not entitled to abandon. The Church in India has the right to send one minister and one elder to represent it in the General Assembly.

**724.** The judicial work of the General Assembly consists of hearing and deciding appeals and complaints from the inferior Courts. These are mainly either cases of discipline, questions in relation to the conduct of worship, or questions relating to disputed settlements under the Patronage Abolition Act, and the regulations framed by the Assembly for the working of the Act. To the General Assembly are also submitted the Synod Rolls, and the annual reports of the various committees of the Church, such as Home Missions, Foreign Missions, etc.; and generally it exercises supervision over the whole life, work, and property of the Church, including the proceedings of the various inferior Church Courts. The sittings of the General Assembly extend annually over ten days in the latter end of May, and it annually elects one of the ministers among its number to be moderator and preside over its deliberations. During his term of office the precedence of the moderator is next to that of the Lord Chancellor.

**725.** In accordance with the Act of 1592 c. 116 above quoted, the King is represented at the sittings of the General Assembly by a Lord High Commissioner,<sup>1</sup> whose commission is issued under the Great Seal of Scotland, and expires with the termination of the sittings of the Assembly for which he was appointed. On the Commissioner presenting his commission, it is read and recorded among the Acts of the Assembly. The Commissioner, as the representative of the Sovereign, is the official medium of communication between the Sovereign and the Assembly, but has no voice in the deliberations of the House in virtue of his office.

<sup>1</sup> Acts and Proceedings of the General Assembly; Hill, *Prac.* 87; Cook, *Styles*, 5th ed., 311; *Ersk.* i. 5, 6.

**726.** Both the Church and the Crown claim right to convene and dissolve Assemblies. Between 1691 and 1695 there was considerable tension between the Church and the Crown in respect of these claims. In November 1691 the Assembly did not meet on the appointed day, in consequence of the absence of the Commissioner. It was thereafter summoned by Royal Proclamation to meet on 15th January 1692. After it had met on that date, and sat for about a month, but had failed to meet the views of the King on points which he had by letter submitted to it, the Commissioner declared the Assembly dissolved, and declined to name a day for the meeting of the next Assembly. The Assembly separated, but, before doing so, itself fixed a day on which it should reassemble. Eventually it did not meet on the day it had fixed, and the next Assembly, 1695, was called by Royal Proclamation. Since 1695, no conflict has occurred between the Crown and the Church in these matters. The practice at the close of an Assembly is for the Moderator to declare that, in the name of the spiritual Head of the Church, he dissolves the Assembly, and appoints it to meet again on a date which he then names. The Commissioner then makes a similar declaration that, in the name of the Sovereign, he dissolves the Assembly, and appoints it to meet again on a date which he names. By previous arrangement, the Moderator and the Commissioner name the same date. In 1746, the Commissioner did not arrive on the day appointed for the opening of the Assembly. In 1761, it was reported to the Assembly by the Lord Advocate that the Commissioner was in the town, but that, owing to the death of an official, his commission was not completed. In 1798, the commission and Royal Letter accompanying it were laid on the table of the Assembly, but the Commissioner, owing to family bereavement, did not attend till some days later. In all these cases the Assembly convened on the appointed day, and proceeded to business. When, from any cause, the Commissioner was unable to continue to be present, it was at one time the practice for the Assembly to resolve itself into a committee of the whole House, which carried on the business, and had its actions formally adopted on the House resuming. Since 1825 this has not been considered necessary, and the Assembly proceeds in his absence. The Commissioner's official style is "His Grace the Lord High Commissioner to the General Assembly." His salary is appointed to him from the Consolidated Fund.

**727.** The Legislative functions of the Church are vested in the General Assembly; but Synods, Presbyteries, and members of Assembly have the right to approach it by way of "overture," with the view of initiating legislation, and it is in this way that legislative projects are set on foot. The adoption of an overture, however, by the General Assembly does not at once convert it into a law of the Church; for the Assembly's legislative powers are (with certain exceptions) exercised under the restrictions imposed by Act IX. of Ass. 1697, commonly known as the Barrier Act. That Act, which itself followed upon an overture sent down to presbyteries, proceeds on the preamble of the



frequent practice of former Assemblies, the probability that deliberation in making Acts, and previous knowledge of them on the part of the whole Church, will conduce to the exact obedience of them, and the desirability of preventing "any sudden alteration, or innovation, or other prejudice of the Church in either doctrine or worship, or discipline, or government," and enacts that, before the General Assembly passes any Act which is to be a binding rule and constitution to the Church, the same must first be proposed as an overture to the Assembly, and, being passed by it as such, be remitted to the consideration of the several presbyteries of the Church, and their opinions and consent reported to the next General Assembly, "who may then pass the same into an Act if the more general opinion of the Church thus had agreed thereto." Accordingly, it is necessary to the validity of an Act intended to be "a binding rule and constitution," or of an Act rescinding any Standing Act (see Act VIII. of Ass. 1736), that it should have received the approval of at least forty-three of the eighty-four presbyteries of the Church, unless, indeed, where a proposal has been twice sent down as an overture, and presbyteries have failed to return their opinions, in which case the Assembly may (under Act V. of Ass. 1758) competently pass it into law without again submitting it to presbyteries.

728. The Barrier Act is not part of the constitution of the Church recognised by civil law. The Assembly might repeal it. The Act, however, receives incidental recognition in the Churches (Scotland) Act, 1905, s. 5. With regard to the policy of the Barrier Act, Principal Hill remarks that "any person who considers the momentary impressions incident to all large bodies of men in the heat of debate, or in their zeal for a particular object, will not think it advisable that a Court so numerous as the General Assembly, which sits once a year for ten days, should have the uncontrolled power of making laws upon the spur of the occasion."<sup>1</sup> Owing, however, to the negligence of presbyteries in making returns to the overtures transmitted to them, it was found that the effect of the Barrier Act was to produce considerable tardiness in legislation; and with a view to counteract this, the Assembly, whenever circumstances appeared to make it desirable that the proposal embodied in an overture should come into force immediately, were from an early time in use, when sending the overture down to presbyteries, to enact it as an *interim* Act—a course which all Church lawyers are agreed has the effect of giving it binding force till the meeting of the next Assembly. As, however, the power of making *interim* Acts was one which might very easily be abused, the Assembly of 1848 enacted (Act XIV.) that no overture "which involves an essential alteration of the existing law or practice of the Church" should be converted into an *interim* Act, it being understood that the prohibition was not to apply to "measures which may be necessary for carrying out more effectually the subsisting regulations or forms of the Church."

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<sup>1</sup> Hill, View of Constitution of Church of Scotland, p. 67.



**729.** It may be noted that, besides Acts passed in conformity with the procedure required by the Barrier Act, the annually printed Acts of Assembly generally include some enactments in regard to which—either on the ground of inveterate usage or because they deal with matters falling within the judicial or executive, rather than within the legislative, functions of the Assembly—presbyteries have not been consulted, *e.g.* Acts erecting or altering the bounds of a presbytery or a synod—Acts appointing collections, days of humiliation or days of thanksgiving—Acts prescribing regulations for the election and appointment of ministers, etc. The Assembly has also generally (though not uniformly) legislated in regard to its own membership without following the Barrier Act. There appears to be no hard-and-fast line between a mere resolution of a particular Assembly and an Act of Assembly of the kind which does not need to pass under the Barrier Act. It rests very much with the officials of the Assembly in preparing the printed Record to determine what shall be treated as an Act and printed as such.

**730.** The Booke of the Universall Kirk of Scotland (of which the most accessible edition is that published by Peterkin in 1839) contains many of the Acts of Assembly for the period 1560–1616, while the Acts of Assemblies 1638–1649, 1690, 1692, 1694–1895, have been published along with abridgments of their proceedings; and since 1779 a copy of the printed Acts has been deposited in the Advocates' Library, and one has been sent to each University in Scotland and to each synod and presbytery.

**731.** The members of General Assembly, along with one other person not a member, are annually appointed as a Commission of the General Assembly; thirty-one, whereof twenty-one must be ministers, being a quorum. They choose their own Moderator and are empowered to meet four times in the year, and oftener if necessary. The duties of the Commission are defined in the Act of Assembly appointing them. They are to cognosce and finally determine as they shall see cause, in every matter referred to them by the Assembly; to appoint fasts and thanksgivings as they shall see occasion, and to specify the causes thereof; to give advice and assistance to any Synod or Presbytery, or Committee of Assembly, in difficult cases, upon application to them for that end; also to attend to the interests of the Church on every occasion, that the Church, or the present establishment thereof, do not suffer any prejudice which they can prevent, provided always that the general cause be not extended to particular affairs or processes before Synods or Presbyteries, that are not of universal concern to or influence upon the whole Church, save only in respect of giving advice and assistance. They are in all things to proceed according to the Acts and Constitution of the Church, and are accountable to, and censurable by, the next General Assembly, as they shall see cause; and any Synod, or Presbytery, or party who shall decline to comply with the sentence of the Commission, or to give the same full execution, is answerable to the next General Assembly. It is thought that a judgment of the Com-

mission is final, provided it acts within the powers committed to it by the General Assembly, and its procedure is regular.<sup>1</sup> As to history and powers of the Commission, see Report of Committee to Assembly, 1893.

#### SUBSECTION (6).—*Procedure.*<sup>2</sup>

**732.** Procedure in the Church Courts is regulated by Act of Assembly, 1707, XI., approving a form of process in the judicatures of the Church with relation to scandals and censures, and by Act of Assembly, 1889, XIX., dealing with forms and procedure in trial by libel and in causes generally. By the latter, forms of libels in the Church Courts have been assimilated to those of indictments, as now used in the High Court of Justiciary since the passing of the Criminal Procedure Act of 1887. The syllogistic form of libel is therefore no longer in use; and it is sufficient if the libel states facts which constitute a censurable offence, in the manner set forth in the schedule annexed to the Act of Assembly; and it is further enacted, as has been done with regard to indictments, that certain words of style are to be implied in every libel, though not expressed.

**733.** A member of a Church Court is entitled to dissent and complain against the judgment of the Court, and in the case of a dissent from the judgment of an inferior Court, to carry his dissent to a higher Court. A dissent and complaint brings the judgment under review of the higher Court, in the same way as an appeal by a party.

### SECTION 3.—ECCLESIASTICAL DIGNITARIES.

#### SUBSECTION (1).—*General.*

**734.** With the exception of the Moderator of the Church of Scotland, the Dean of the Order of the Thistle, and the Deans and Chaplains of the Chapel Royal, there are no ecclesiastical persons belonging to Scotland and recognised by law as of higher or other rank than that of a parish minister. The clergy of Dissenting Churches have no status recognised by law.<sup>3</sup> In legal processes and documents, they must neither design themselves nor sign their names with territorial titles, but with their Christian names and surnames, adding to their signature their office in their Church, if they please.

#### SUBSECTION (2).—*The Moderator of the General Assembly.*

**735.** The Sixth Assembly (1563) resolved that a Moderator should be appointed for every Assembly "for avoiding confusion in reasoning." It is his part to announce matters, cause good order to be kept, and to

<sup>1</sup> But see Act of Sess. VI. of Assembly, 1648, and *Cross* case, 1888.

<sup>2</sup> Dr. Cook's *Styles of Writs, Forms of Procedure, and Practice of the Church Courts of Scotland*; Dr. Mair, *Digest of Church Laws*.

<sup>3</sup> *Drummond v. Farquhar*, 6th July 1809, F.C.

ascertain the vote. Although in theory the Moderator is chosen and elected by the General Assembly, in practice it has been the custom for the body of ex-Moderators to select the new Moderator and to announce their choice in the month of November in each year, some six months prior to the meeting of the Assembly over which he is to preside. When the Assembly meets the retiring Moderator nominates the person whose selection has thus been announced, and the Assembly formally make the appointment. In England the Moderator of the General Assembly ranks after bishops of the Church of England who are peers of Parliament, and before all barons. In Scotland he takes precedence next after the Lord Chancellor of Great Britain. During his year of office he is addressed as "Right Reverend," and it is the custom to designate as "Very Reverend" those ministers of the Church of Scotland who are ex-Moderators.

SUBSECTION (3).—*The Dean of the Order of the Thistle.*

736. Under Royal Warrant the Dean of the Order of the Thistle is entitled to the prefix "Very Reverend."

SUBSECTION (4).—*Deans of the Chapel Royal.*

737. The Chapel Royal, which was founded in Stirling Castle by King Alexander I. (1107–1124), received from Pope Alexander VI. (1493–1503) the constitution of a collegiate church. The clergy on this foundation were a dean with episcopal jurisdiction, a sub-dean, sacristan, chanter, treasurer, archdean, and sixteen chaplains. The chapel was endowed with lands and teinds from the royal domains, and became the appropriator of several parishes. It was partially suppressed at the Reformation, and the benefice was resumed by the Crown. From 1567 till 1606, the clergy appointed to the vicarage of the chapel were styled Ministers of the King's House. In 1606, the chapel was reformed to some extent by Act of Parliament. The title of dean was revived, and the place of the chapel was appointed to be "at Halyrudhous, within the Palice of the samyn, and called His Majesties Chapell Royall of Scotland." The office of Dean of the Chapel Royal is in the gift of the Crown. Since 1727, the benefice of the Chapel Royal has been divided in three parts. In pursuance of the recommendations of the Scottish University Commissioners' Report, 1863, one deanery revenue is now applied to the support of the Chair of Biblical Criticism in the University of Edinburgh. The Chairs of Divinity at Edinburgh, Biblical Criticism at Glasgow and at Aberdeen, and Ecclesiastical History at St. Andrews, have half a revenue each. The practice of the Crown in conferring the title of Dean on the holders of these portions of the benefice has not been uniform. The present revenue of the benefice is derived from lands in the counties of Wigtown, Kirkeudbright, Ayr, and Perth, and from teinds of the lands of Shaws, Helmburn, and Balliades, now



in the parishes of Ettrick and Kirkhope, in Selkirkshire. The chapel's teinds are liable to be localled upon for minister's stipend after teinds which have been acquired by heritable rights, in respect they were originally, and still continue to be, destined to pious uses.<sup>1</sup>

#### SECTION 4.—CHURCH AND PARISH.

##### SUBSECTION (1).—*Parish Quoad Omnia.*

**738.** The parish is now an important unit in civil administration but it is in origin ecclesiastical. It is simply the district attached to the parish church, its inhabitants being entitled to the services of the parish minister, while until the Act of 1925<sup>2</sup> its heritors were bound to provide what was necessary for the ministrations of religion. Parishes are landward, burghal or mixed. Landward parishes are those which are wholly or mainly rural in character, burghal are those which are wholly comprised within a burgh. Prior to the Act of 1925 the rights and duties of minister and heritors varied according as a parish belonged to one or other of these classes.

**739.** Under various statutes from 1617 (c. 3) onwards, successive Commissions of Parliament altered parish areas by uniting small parishes, dividing large ones, and erecting new parishes. By an Act of 1707, c. 9, these powers were conferred on the Judges of the Court of Session as Lords Commissioners for Plantation of Kirks and Valuation of Teinds. The boundaries determined by the Court of Teinds in the union of small parishes, erection of new parishes, and alteration of parish boundaries were the parish boundaries for all purposes, *i.e. quoad omnia*, unless the decree expressly stated otherwise. The New Parishes (Scotland) Act, 1844<sup>3</sup> laid down more specifically than had previously been done the conditions necessary for the disjunction and erection of parishes *quoad omnia* by the Court of Teinds. Under this Act the consent of the heritors of a major part of the valuation of the parish to the proposed disjunction became sufficient, whereas previously the consent of the heritors of three parts out of four of the valuation had been necessary.<sup>4</sup> In certain cases even this consent might be dispensed with,<sup>5</sup> while largeness of population apart from area might justify the division of a parish.<sup>6</sup>

##### SUBSECTION (2).—*Parish Quoad Sacra.*

**740.** The New Parishes (Scotland) Act, 1844,<sup>7</sup> legalised the erection of *quoad sacra* parishes which the General Assembly had previously attempted without success to do as being *inter spiritualia*.<sup>8</sup> The

<sup>1</sup> *Deans of the Chapel Royal v. Hay and Ors.*, 11th Dec. 1799, F.C. App. 9; Stair, ii. 8, 15; Bankt. ii. 8, 101; Fasti, Eccl. Scot. i. 393; Regist. Dunfermlin. 4; Rogers, Hist. of Chapel Royal, 1882.

<sup>2</sup> 15 & 16 Geo. V. c. 33.

<sup>4</sup> *Ibid.*, s. 1.

<sup>5</sup> *Ibid.*, s. 4.

<sup>3</sup> 7 & 8 Vict. c. 44, ss. 1-7.

<sup>6</sup> *Ibid.*, s. 2.

<sup>7</sup> *Ibid.*, ss. 8-11.

<sup>8</sup> *Cunninghame v. Presbytery of Irvine*, 1843, 5 D. 427.



matter was further regulated by the United Parishes (Scotland) Act, 1868,<sup>1</sup> and the United Parishes (Scotland) Act, 1876.<sup>2</sup> Under the 1844 Act, where any person or persons had built or acquired and endowed a church, the Court of Teinds might, on his or their application, designate and disjoin a district to be attached to it *quoad sacra* without any concurrence of heritors. The Court required to be satisfied, however, that the church was inalienably secured as the church of the new parish and that due provision was made for its maintenance. It was also necessary that a minimum stipend and a manse, or a payment in lieu thereof, should be provided and secured for the minister, and in the case of a manse, that due provision should be made for its maintenance.<sup>3</sup> The right of Presbyteries to present to vacant *quoad sacra* parishes *jure devoluto* was laid down.<sup>3</sup> A proportion of the seats might be let and the proceeds applied to maintenance or improvement of fabrics and payment of stipend to the relief of the persons liable therefor.<sup>4</sup> By the 1868 Act in a united parish which had two or more churches, one of these might be accepted as the church of a new parish *quoad sacra* without provision for its maintenance being required since the heritors of the united parish remained liable for this. Under the Act of 1876 the Court of Teinds, on proof of the consent of the presbytery, could attach one of the glebes of a united parish which had more glebes than one to a *quoad sacra* parish formed wholly out of the united parish.<sup>5</sup> This might be done either at the time of erection or subsequently. The erection being *quoad sacra tantum*, only ecclesiastical rights and liabilities were affected and the heritors remained liable for the parochial ecclesiastical burdens of the old parish.<sup>6</sup> At the same time the ministers and elders of a parish *quoad sacra* "have and enjoy the status and all the powers, rights, and privileges of a parish minister and elders of the Church of Scotland."<sup>3</sup>

#### SUBSECTION (3).—*Parliamentary Churches.*

**741.** Two Acts of Parliament in 1824 and 1825,<sup>7</sup> proceeding upon a narrative of the great extent of many Highland parishes, and the impossibility for many of the inhabitants to attend divine service and for ministers to visit their more distant parishioners, made provision for the expenditure of a Parliamentary grant of £50,000 upon the erection of additional churches and manses in the Highlands. A body of Commissioners was appointed to carry out this work, the Act providing that not more than forty new churches with manses might be erected, while a number, not exceeding ten, of existing places of worship might be repaired and manses provided for them. It is not now necessary to

<sup>1</sup> 31 & 32 Vict. c. 30.    <sup>2</sup> 39 & 40 Vict. c. 11.    <sup>3</sup> 7 & 8 Vict. c. 44, s. 8.    <sup>4</sup> *Ibid.*, s. 9.

<sup>5</sup> *Minister of Brydekirk v. Hoddam Heritors*, 1877, 4 R. 798.

<sup>6</sup> *Mags. of Fortrose v. MacLennan*, 1880, 8 R. 124; cf. *Reid v. Commrs. of Woods and Forests*, 1850, 12 D. 1211, at 1215, per Lord Justice-Clerk Hope.

<sup>7</sup> 4 Geo. IV. c. 79; and 5 Geo. IV. c. 90.

elaborate the procedure and requirements laid down by the Acts for the erection of these churches. A district was attached to each of these various places of worship but was not thereby disjoined from the parish. The Acts provided for the payment by the Exchequer to the ministers attached to the Parliamentary churches of a stipend of £120, and that payment has survived. The total amount for the whole of the forty-two parliamentary charges (£5040) is now paid by the Exchequer to the Church of Scotland General Trustees in accordance with s. 19 of the Act of 1925, and administered by them under a scheme framed by the Scottish Ecclesiastical Commissioners<sup>1</sup> in accordance with the provisions of s. 39 of that Act.

**742.** Sec. 14 of the New Parishes (Scotland) Act, 1844, contained provisions whereby the Parliamentary churches and the districts attached to them might be erected into parishes *quoad sacra* while s. 15 of the same Act provided a means whereby they might be erected into parishes *quoad omnia*. In point of fact the whole of these churches and districts were in course of time dealt with under the former section, and became parishes *quoad sacra*.

#### SUBSECTION (4).—*Chapels of Ease.*

**743.** There are a number of non-parochial churches and stations, regarded by the Church as mission agencies, of which some have and some have not received a constitution from the General Assembly. Almost all have districts assigned to them, but only those which have a constitution are properly called Chapels. The election of ministers to these is conducted, as far as possible, under the Assembly's regulations for parishes. The minister is not a member of any Court but has the pastoral care of his district and administers the sacraments in it. Before a constitution will be granted, the Presbytery must be satisfied as to the desirability of the chapel and the adequacy of provisions for stipend and other expenses. The titles to the buildings are usually taken in the name of trustees and a committee of management is appointed.

### SECTION 5.—CHURCH PROPERTY AND ENDOWMENTS.

#### SUBSECTION (1).—*The Benefice.*

**744.** This term, as now used in Scotland to represent a Church living, is applicable to parishes of which the constituent endowments are of a different order from those available when it originally came into use. There is some evidence that in early times an estate in land granted for military service was called a benefice.<sup>2</sup> According to Forbes,<sup>3</sup> so early as the twelfth century the possessions of ecclesiastics were termed benefices, "because they flowed most from pious bounty and

<sup>1</sup> Scheme No. 1, entitled "Treasury Moneys Allocation Scheme."

<sup>2</sup> Craig, *Jus Feudale*, i. 14, 2; and Ross, *Lectures*, ii. 146 *et seq.*

<sup>3</sup> On Tithes, 104.

liberality"; while Erskine<sup>1</sup> accounts for the transfer of the term, by Canonists, to Church livings, "because these were also gratuitous rights in favour of Churchmen in consideration of their spiritual warfare." The growth of these possessions during the centuries which preceded the Reformation, which in Scotland commenced in 1560,<sup>2</sup> had been rapid and extensive. They embraced the lands which were bestowed on Churchmen, which were called the temporality of benefices, and the teinds, which were called the spirituality of benefices.<sup>3</sup> The right to teinds had been generally recognised.

**745.** The annual revenue from the temporality at the Reformation has been set down as equal to one-fourth part of the rents of lands in Scotland, and the revenue from the spirituality at another fourth, being together equal to a half.<sup>4</sup> The estimate has been doubted.<sup>5</sup> But it was probably not far from the truth, having regard to the manner in which teinds were then uplifted, and the value of the Church lands, which, as has been observed, were some of the best in the kingdom.<sup>6</sup>

**746.** Various Acts of Parliament were passed to prevent the dilapidation of benefices.<sup>7</sup> The process had, however, begun before the Reformation, and in the course of a few years much of the Church property had changed hands. Spottiswood<sup>8</sup> says that "the Churchmen who were Popish took presently a course to make away all the manses, glebes, tithes, and all other rents possessed by them to their friends and kinsmen; and most of them that subscribed (the Book of Church Order), getting into their hands the possessions of the Church, could never be induced to part therewith, and turned greater enemies on that point of Church patrimony than were the Papists or any other whatsoever." The lands thus made over were erected into temporal lordships, and the owners became "Lords of Erection," while those who obtained grants of teinds were described as "Titulars of Teinds."<sup>9</sup>

**747.** In that state of matters some difficulty was experienced in obtaining stipends for the reformed clergy. The Privy Council, however, intervened, and stipends were awarded by a Commission out of the thirds of benefices. There was also passed the Act 1563, c. 8, which ordained that the minister should have the principal manse of the parson, with a proportion of the glebe. And the Act 1572, c. 5, provided that he should have four acres of the glebe most adjacent to the

<sup>1</sup> ii. 10, 4.

<sup>2</sup> Elliot, Teind Court Procedure, 3.

<sup>3</sup> For a list of old parishes in Scotland, see Keith's *Scottish Bishops*, 211 *et seq.*; and in same work will be found Spottiswood's account of the Religious Houses, 381 *et seq.*

<sup>4</sup> Mackenzie, *Obs.* 308.

<sup>5</sup> Connell on Tithes, i. 73, and authorities cited, on that subject, and as to the taxation imposed on Church lands.

<sup>6</sup> See also Thomas Thomson's pleading on "the old extent" as to taxation of Church lands and their value (*Cranstoun v. Gibson*, 6th Jan. 1816, in Robertson Collection of Session Papers, vol. xci. in Advocates Law Library). The rental of benefices made up by order of the Privy Council in 1560 is printed by Keith, Appendix B, p. 180 *et seq.*, and a summary and notes will be found in Connell, *supra*.

<sup>7</sup> Stewart, *Abridgment of Acts*, 28.

<sup>8</sup> *History*, 165.

<sup>9</sup> See as to these grants, Forbes, 97 *et seq.*



manse, or otherways. Further provision was made by the Acts 1592, c. 10, and 1593, c. 8. The Act 1606, c. 6, provided that where there was no arable land adjacent to the kirk, the minister should be entitled to four soums grass for each acre of arable land—in all, sixteen soums, and that of the most commodious and best pasturages of any kirk lands lying nearest the kirk. The Act 1578, c. 6, declared that glebes were free from paying teind, and this immunity was extended to pasture lands, where designed from want of arable lands, by Act 1621, c. 10. The designation of glebes devolved upon the Church, and is still occasionally exercised by the Presbytery of the bounds.

**748.** Some efforts were made to recover Church lands during the reign of King James VI., and on his attaining majority the Act of Annexation, 1587, c. 29, was passed.<sup>1</sup> These measures were not successfully followed up. King Charles I. succeeded to the throne in 1625, and soon after took proceedings to recover an income from Church lands, and also from the teinds. He was successful in obtaining the latter, but as regarded the former he completely failed. By the Act 1707, c. 84, passed immediately before the Union, all Acts of Annexation were rescinded, and the successors of the Lords of Erection remained in possession.<sup>2</sup> On the abolition of Episcopacy after the Revolution Settlement of 1688, such lands and teinds as were held by bishops fell to the Crown. The other Church lands are now completely absorbed in private estates, and the Church has only possession of the small parcels which have been designed out of these lands as glebes. The modern benefice in old parishes generally includes the stipend, the glebe, and the manse. With few exceptions, the parishes erected under the Act 7 & 8 Vict. c. 44 are *quoad sacra*, with endowments chiefly provided from feu-duties and ground-annuals.<sup>3</sup>

#### SUBSECTION (2).—*The Effect of the Act of 1925.*<sup>4</sup>

**749.** A complete change in the tenure of ecclesiastical property and endowments has been brought about by the Church of Scotland (Property and Endowments) Act, 1925. Prior to this Act the responsibility for the provision and maintenance of the requisites of religious ministration in an old parish rested on the heritors whose principal obligations were “the building, rebuilding, or repairing of churches or manses, or the designing or excambing of sites therefor, or the designing or excambing of glebes, or additions to glebes, or the designing or excambing of sites for additions to churchyards and the suitable maintenance thereof (including the building, rebuilding, or repairing of churchyard walls).”<sup>5</sup> The constituent members of the body of heritors of a parish varied

<sup>1</sup> Kames, Statute Law, 197.

<sup>2</sup> Elliot, Teind Court Procedure, 205.

<sup>3</sup> For lists of present parishes and general statement of their endowments, see Elliot, Teind Court Procedure, 165 *et seq.*

<sup>4</sup> 15 & 16 Geo. V. c. 33.

<sup>5</sup> 31 & 32 Vict. c. 96, ss. 1 and 3.



according as the basis of assessment for these various purposes was real rent or valued rent, a matter which depended on the nature and circumstances of the parish and on the particular purpose for which the assessment was necessitated. Superiors, titulars, liferenters, and tenants, even though holders of long leases, were not heritors, while a body such as a railway company might be a heritor. Heritors' assessments were personal claims and not *debita fundi*, and there were a number of modes of calling a meeting of heritors. The Ecclesiastical Buildings and Glebes Act, 1868,<sup>1</sup> authorised the substitution of newspaper advertisement for individual citation when the number of heritors exceeded forty.

**750.** The general effect of the Act of 1925, which was designed to remove obstacles to the Union of the Church of Scotland and the United Free Church of Scotland, was to transfer all ecclesiastical property and endowments, as well as responsibility for their maintenance and control, to the Church itself, and to terminate the responsibilities of heritors. For the purpose of holding and administering the property and endowments so transferred a body known as "The Church of Scotland General Trustees" was set up by the Church of Scotland General Trustees (Order Confirmation Act), 1921. To this body, which is subject to the control of the General Assembly, the Act of 1925 appoints the transfer of property and the duty of administration. The details of the various provisions for the transfer of different types of property and endowments and the termination of heritors' liabilities will be found below under separate headings.

## SECTION 6.—THE MINISTRY.

### SUBSECTION (1) *Election of Minister.*

#### (i) *In Ordinary Form.*

**751.** Prior to 1874 a minister was presented to a parish by the patron of the benefice, the right of patronage having been recognised at an early period in the history of the Church. Originally acquired by one who had founded a church, by building or endowing it, or by giving the land upon which it was built, the right came afterwards to be claimed by persons of influence living in the neighbourhood of churches, although they had done nothing towards founding or endowing them. Until the Reformation the Pope claimed the right of patronage of all churches which had no private patrons, and after the Reformation this right of universal patronage was assumed by the Crown. The *jus presentationis* has since the Reformation been the occasion of much dissension within the Church, and of conflict between the Church and the civil authorities. Numerous Acts of Parliament have been passed dealing with the matter, and the rights of the patron have been fully considered by the Courts in the

<sup>1</sup> 31 & 32 Vict. c. 96.

important cases which led up to the disruption of the Church in 1843.<sup>1</sup> The right was finally abolished by the Church Patronage (Scotland) Act, 1874.<sup>2</sup>

**752.** Under the Church Patronage (Scotland) Act, 1874<sup>2</sup> every parish minister in Scotland is elected by the congregation of the parish church. It is thereby provided that—

“The right of electing and appointing ministers to vacant churches and parishes in Scotland is hereby declared to be vested in the congregations of such vacant churches and parishes respectively, subject to such regulations in regard to the mode of naming and proposing such ministers by means of a committee chosen by the congregation, and of conducting the election, and of making the appointment by the congregation, as may from time to time be passed by the General Assembly of the Church of Scotland: Provided always that, with respect to the admission and settlement of ministers appointed in terms of this Act, nothing herein contained shall affect or prejudice the right of the said Church, in the exercise of its undoubted powers, to try the qualifications of persons appointed to vacant parishes; and the Courts of the said Church are hereby declared to have the right to decide finally and conclusively upon the appointment, admission, and settlement in any church or parish of any person as minister thereof. The ministers appointed, admitted, and settled in terms of this Act are hereby declared to have in all respects the same rights, privileges, and duties which belong to or are incumbent on the ministers of the said Church.”

(ii) *By the Presbytery Jure Devoluto.*

**753.** Under the system of presentation the patron was bound not to leave the parish for any lengthened period without a minister through his failure to appoint, and in order to secure that parishes were not left vacant, through neglect on the part of patrons, the law provided that if a patron did not exercise his right within six months of the occurrence of a vacancy, the right to make an appointment devolved upon the Presbytery. This right was termed *jus devolutum*. The Church Patronage (Scotland) Act, 1874, while abolishing patronage, provided that if a congregation failed to make an election within six months of the occurrence of the vacancy, the right to make the appointment should devolve upon the Presbytery, just in the same way as, under the old patronage system, where the patron failed to make a timeous appointment.

**754.** There have been several cases arising out of this section. It has been found that notwithstanding the provision of s. 3 of the Act, under

<sup>1</sup> See the *Auchterarder* case (*Earl of Kinnoull v. Ferguson*, 1838, 16 S. 661; affd. 1839, MacL. & R. 220; 1841, 3 D. 778; affd. 1842, 1 Bell's App. 662; 1843, 15 S.J. 381), the *Lethendy* case (*Clark v. Stirling*, 1839, 1 D. 955), and the *Strathbogie* case (*Edwards v. Cruickshank*, 1840, 3 D. 283; 1843, 15 S.J. 375 and 423).

<sup>2</sup> 37 & 38 Vict. c. 82.

which the Church Courts have power to decide finally and conclusively upon the appointment, admission, and settlement of any minister, the question whether in any particular case the *jus devolutum* has accrued is one for the civil tribunals to determine.<sup>1</sup> The opinion has been expressed that the General Assembly has no power to extend the period by granting to the congregation another six months, or otherwise, when some miscarriage has occurred.<sup>2</sup> Where, however, there has been a miscarriage owing to the action of the Moderator or of the Church Courts, for which the congregation are not responsible, the congregation are not thereby deprived of the right to elect, notwithstanding the expiry of the six months from the occurrence of the original vacancy.<sup>3</sup>

**755.** The question, however, which has given rise to most difficulty, both before and after the abolition of patronage, is the effect in relation to the *jus devolutum* of a presentation or election which, for some reason or another, comes to nothing, and does not lead to the induction of a minister. The following are the rules which obtained during the period of patronage, as stated by Bankton and Erskine:—

“If the patron acquiesces to the rejection of the presentee by the Presbytery, the residue of the six months that remained at the time the presentation was made commences to run from the time of such refusal, or from the time the appeal is finally discussed, within which he may present another, provided the presentee was an actual minister or licentiate, and declared his acceptance or willingness to accept; as likewise he has the residue of the six months in case of the presentee’s death happening after the presentation is offered to the Presbytery . . . but if the patron presents one who does not accept within six months, or who is not legally qualified, as not having taken the oaths required by law, or the like, he can only, on the presentee’s being rejected, present another within the six months of the vacancy happening.”<sup>4</sup>

“If the presentee be qualified in terms of the statute, the currency of the six months is suspended by the presentation during the whole time the Church Courts are employed in deliberating whether to receive him or not; and if they should at last reject him for heterodoxy, or whatever other cause, the patron has as much time left him to present, after their sentence, as was to run of the six months when the presentation was offered to the Presbytery.”<sup>5</sup>

It is thought that these rules still obtain under the new system of appointment. It has been suggested<sup>6</sup> that where an appointment has not been sustained by the Church Courts, the six months run on without interruption. The case, however, which is supposed to support this

<sup>1</sup> *Stewart v. Presbytery of Paisley*, 1878, 6 R. 178; *Cassie v. General Assembly of the Church of Scotland*, 1878, 6 R. 221.

<sup>2</sup> *Cassie v. General Assembly of the Church of Scotland*, *supra*, per Lord Young p. 225. and Lord Gifford p. 240.

<sup>3</sup> *M’Farlan v. Presbytery of Cupar*, 1879, 16 S.L.R. 480; *Dunbar v. Presbytery of Abernethy*, 1889, 26 S.L.R. 517.

<sup>4</sup> Bankt. i. ii. 64.

<sup>5</sup> Ersk. i. v. 17.

<sup>6</sup> Mair, Digest, 300.



view <sup>1</sup> was very special, and does not seem to go further than that if the election is irregular, and therefore void, it is no election, and does not interrupt the running of the six months. There does not seem to be any reason why the old rule should be departed from, that when a qualified person is appointed and accepts, and the Church Courts reject him, the running of the six months pauses whilst the case is in dependence.<sup>2</sup>

**756.** After his election a minister must pass certain trials before the Presbytery, who may either reject him as unqualified or else sustain his trials, proceed to ordination (if he be not already an ordained person), and admit him to the benefice.

#### SUBSECTION (2).—*Induction.*

**757.** The minister-elect is required to sign the Confession of Faith, and a formula thereto attached, in such terms as the General Assembly may prescribe.<sup>3</sup> Induction is the step which vests the minister with the benefice. A learned disquisition upon the subject of induction by the late Lord Pres. Inglis will be found in *Hastie*.<sup>4</sup> Except in the case of foreign missionaries and such appointments as army chaplaincies, the law and practice of the Church forbids the conferring of orders except upon someone appointed to a definite charge. A licentiate is simply a layman with a licence to preach, he is not a minister of the Church of Scotland, and the ascription to him of the title of reverend is merely a matter of courtesy.

#### SUBSECTION (3).—*Demission.*

**758.** A clergyman of the Church of Scotland may resign or demit his office and his present charge; but before he is allowed to withdraw, the parishioners are cited for their interest. The main purpose of citation would seem to be to ascertain whether he may not have had recourse to resignation in order to escape the discipline of the Church; but the proceeding also affords him opportunity to reconsider a resolution which he may have adopted hastily and without any thought of avoiding inquiry into his conduct. If, after citation, no objection be offered by parishioners, or if the clergyman, on being conferred with by, or by order of, his Presbytery, adheres to his resolution, the Presbytery, after judging of the reasons of demission, must either accept the resignation tendered or proceed against the minister by libel or otherwise. The General Assembly of 1758 declared Mr. Thomas Boston, who had demitted his charge, to be no longer a minister of the Church of Scotland. The Presbytery of Edinburgh, in 1876, dealing with a letter from one of its clerical members (who was also the occupant of a professorial chair), intimating resignation of his parochial charge, and "demitting his orders and functions as a minister of the Church," accepted the resignation

<sup>1</sup> *Craig v. Anderson*, 1893, 20 R. 941.

<sup>3</sup> 5 Edw. VII. c. 12, s. 5.

<sup>2</sup> *Mair*, Digest, 292-302.

<sup>4</sup> 1889, 16 R. 715.



after a committee, who had been appointed to confer with their co-presbyter, had reported his adhesion to the intimation made. The Presbytery at the same time—three of their number dissenting—declared that “by his own act” the minister referred to “had ceased to be a minister of the Church of Scotland.”

**759.** A beneficed clergyman, on appointment to a professorial chair in the Divinity Faculty of one of the four Universities, is entitled to be loosed from his charge forthwith.

#### SUBSECTION (4).—*Deposition.*

**760.** A parish minister found guilty of immoral conduct will be deposed from the office of the holy ministry. The sentence of deposition prohibits him from exercising the office under pain of the highest censure of the Church, and deprives him of the whole emoluments of the benefice. If a minister be found guilty of promulgating doctrines at variance with the tenets of the Church of Scotland, he may either be deposed as above, or be suspended from the exercise of his office for a specified time without being actually deprived of the parochial charge he holds. During the period of suspension a substantial share of the emoluments will be assigned to the temporary substitute. A licentiate not in possession of a charge, if proved guilty of immoral or of scandalous behaviour, may be deprived of his licence to preach the gospel; but in his case there are no civil consequences.

**761.** Between 1836 and 1880 the inferior judicatories of the Church, proceeding upon an erroneous interpretation of a decision of the General Assembly in the former year, never deposed a minister in absence. In the latter year the Presbytery of Islay and Jura adopted the view that deposition should at once follow the finding of certain counts of the libel proven, and, after citation of the accused, pronounced sentence of deposition *in absentia*. The minister petitioned the General Assembly to find that sentence of deposition had been illegally pronounced, but after inquiry, that Court sustained the action of the Presbytery. The sentence took effect at the date of pronouncement; and the minister was thus deprived of a half-year's stipend to which he would have been entitled had he been present before sentence was pronounced, and appealed to the Supreme Court of the Church. He afterwards tried to reduce the whole proceedings in the Court of Session, but the action was dismissed.

**762.** A deposed minister may be restored to the ministry by or under the authority of the General Assembly; but restoration is seldom granted, except after production of the clearest evidence of the applicant's penitence.

#### SUBSECTION (5).—*Incidents of Office.*

**763.** The ministerial office and any benefice to which the minister may have been inducted are held *ad vitam aut culpam*. The Church

Courts cannot deprive a minister of his office, or extrude him from his parish, except under the forms of process. Nor can they deprive him of his living, without depriving him of his ministerial office by a sentence of deposition. They may, however, suspend him from the exercise of the duties of his office for a longer or shorter period; and during the term of suspension, if it be for a specified period, they may assign to a *locum tenens* a sum not exceeding one-half of the emoluments of the parish.<sup>1</sup> The sentence, duly intimated to the titulars, is equivalent to a legal assignation by the minister of the proportion of the stipend specified.

**764.** Ministers are bound to reside within their parishes and to discharge personally the duties of their office, and a minister may be deposed for desertion or inefficiency. Pluralities are forbidden by the law of the Church; and a minister appointed to a university chair must resign his ministerial charge, and the like in the converse case.

**765.** Under the Statute last above cited, which is known as the Belhaven Act, provision is made whereby, when a parish minister becomes of unsound mind, the Presbytery may appoint an assistant to discharge the duties of the ministerial office, and may assign to him a sum not exceeding one-half of the emoluments of the benefice.

**766.** The minister has free entry to the church for divine worship, and the control of the order and manner in which the services are conducted. He is the custodier of the baptismal and communion vessels and furniture, and is responsible for their safe keeping. He has the sole right of officiating at the public divine services in connection with the National Church, and except with his consent, or by order of the Presbytery or some superior Ecclesiastical Court, no other minister of the Established Church is entitled to officiate at such service in his parish, or to administer ordinances therein.

**767.** A minister of the Established Church cannot be a member of any civil judicatory, or a member of Parliament.<sup>2</sup> Practice, however, seems to sanction his acting as a justice of the peace. A parish minister may act as a notary, for the purpose of subscribing a will, in his own parish.<sup>3</sup> He was formerly, but is no longer, exempt from poor-rate for his manse and glebe,<sup>4</sup> and he is liable in school-rate and other assessments. He is also liable for poor-rate in respect of any property other than a legal manse or glebe. The parish minister is moderator of his own kirk-session, and he is a constituent member of the Presbytery and the Synod and is eligible for election by the Presbytery as a commissioner to the General Assembly. He cannot, however, be elected as a commissioner for any other Presbytery, or as an elder to represent a royal burgh. Ministers of religion, whether of the Established or of Dissenting Churches, are exempt from the duty of serving upon juries.

**768.** The rights of the minister of a Dissenting Church against his

<sup>1</sup> 26 & 27 Vict. c. 47, s. 3.

<sup>2</sup> Mair, Digest of Church Law, 4th ed., 79, 80.

<sup>3</sup> See 14 & 15 Geo. V. c. 27, s. 18 (1).

<sup>4</sup> 16 & 17 Vict. c. 47, s. 2 (4).

denomination or those who represent it are matters of civil contract, and have been so treated by the Court in a number of cases.<sup>1</sup>

**769.** Because the rights of churchmen are more exposed to accidents than those of other men, owing to the frequent change of incumbents, the maxim *Decennalis et triennalis possessor non tenetur docere de titulo* has been adopted into the law of Scotland from the canon law. Thirteen years' possession is thus sufficient to support a churchman's right to any subject as part of his benefice without a title. The presumption of a good title arising from possession may be displaced by contrary proof, and if the churchman's title is recovered, and it appears that his possession was inconsistent therewith, his right will, in the future, be strictly commensurate with his title.<sup>2</sup> But when the minister's right, presumed from his possession, has been judicially declared, he has a title of property equivalent in every way to a proper written title. The right arising from thirteen years' possession is dependent upon the continuance of possession; but incumbents are entitled to found on the possession of their predecessors in office.<sup>3</sup> A precentor is not entitled to the benefit of the rule.<sup>4</sup>

#### SUBSECTION (6).—*Stipend.*

**770.** The stipends payable to the parochial clergy of the Church of Scotland may be classed as follows, viz.: I. Stipends from teinds, with supplements in some cases from Exchequer and other sources, including special Crown grants apart from those given from Exchequer. II. Stipends payable by Burghs in the case of Burgh Churches.<sup>5</sup> III. Stipends in ordinary *quoad sacra* parishes where special endowments have been provided to the amount of £100 with a manse, or £120 without a manse. These are the minimum stipends, but in some cases slightly larger stipends have been provided. The stipends, and also sums for the maintenance of fabrics, must be secured to the satisfaction of the Court of Teinds, in terms of s. 8 of the New Parishes (Scotland) Act, 1844.<sup>6</sup> IV. Stipends from Exchequer to the amount of £120 each, with manses and glebes, in the cases of Parliamentary Churches. These Parliamentary churches, erected under the Acts 4 Geo. IV. c. 79 and 5 Geo. IV. c. 90, with districts attached, have now been all erected into parishes *quoad sacra* in virtue of s. 14 of the New Parishes (Scotland) Act, 1844. There are in all forty-two of these parishes; there are, however, forty-three Parliamentary churches, owing to the fact that originally there were two churches in the parish of North Ballachulish. When

<sup>1</sup> *M'Millan v. Free Church*, 1859–1862, 22 D. 290; 24 D. 1282; 1864, 2 M. 1444; *Skerret v. Oliver*, 1896, 23 R. 468; *Brook v. Kelly*, 1893, 20 R. 470; 20 R. (H.L.) 104.

<sup>2</sup> *Stair*, ii. 1, 25; *More*, *apud Stair*, cxlvii.; *Ersk. Inst.* 3, 7, 33, 34; *Ersk. Prin.* 3, 7, 13; *Greig v. Duke of Queensberry*, 21st November 1809, F.C.; *Bishop of Dunblane v. Kinloch*, 1676, Mor. 7950; *Representatives of Rule v. Mays. of Stirling*, 1708, Mor. 11002.

<sup>3</sup> *Cochrane v. Smith*, 1859, 22 D. 252.

<sup>4</sup> *Traill v. Dangerfield*, 1870, 8 M. 579.

<sup>5</sup> For a list of the Burgh Churches see 15 & 16 Geo. V. c. 33, Ninth Sched.

<sup>6</sup> 7 & 8 Vict. c. 44.



the *quoad sacra* parish of Ardgour was erected and disjoined from North Ballachulish one of these churches was made the parish church of Ardgour, the endowment for the parish being provided, not out of Exchequer funds, but in the way usually followed in the case of *quoad sacra* parishes.<sup>1</sup>

**771.** The stipends from teinds, when in money, are payable one-half at Whitsunday and the other half at Martinmas; but if in victual, as to a large extent they are, as required by the Teinds Act, 1808—except in cases where the teinds are valued in money and surrendered—they fall to be paid at the highest fiars prices of the county betwixt Yule and Candlemas, after the separation of the crop from the ground, or as soon thereafter as the fiars prices of the county shall be struck. Where there are surplus teinds, this class of stipend may be augmented on the expiry of twenty years from the date of last augmentation; or upon the expiry of twenty years from the date of the last application, or upon the expiry of ten years from the passing of the Church of Scotland (Property and Endowments) Act, 1925, whichever is the earlier.<sup>2</sup> By that Act provision is made for the payment of a standardised stipend of a fixed money value in place of a stipend dependent upon the fluctuation in the price of victual.<sup>3</sup> Standardisation of stipend is not applicable until a vacancy occurs after the passing of the Act,<sup>4</sup> unless a minister elects to have a standardised in place of a victual stipend.<sup>5</sup> Standardised stipends vest *de die in diem* in the minister,<sup>6</sup> whereas the vesting of victual stipends depends upon whether the minister was incumbent of the parish at the terms of Whitsunday and Michaelmas respectively, one-half being due at each date. The stipends in ordinary *quoad sacra* cases are payable half-yearly at Whitsunday and Martinmas by equal portions; while those payable from Exchequer are due one-half at Whitsunday (15th May) and the other half at Michaelmas (29th September).

**772.** The minister is provided, at the expense of the heritors, with a decree of modification and locality, to enable him to recover his stipend payable from teinds; but the right to raise an ordinary action for stipend is expressly reserved by the Act 1695, c. 27, and this right has been recognised by the Court of Session.<sup>7</sup>

**773.** There is a special class of cases for which grants were made from Exchequer under the Acts 50 Geo. III. c. 84, and 5 Geo. IV. c. 72. The amount provided under the first Act, passed in 1810, was £10,000; and under the second Act, passed in 1824, was £2000. The purpose was to supplement stipends so as to increase them to £150; and where there was neither manse nor glebe, the second Act allowed them to be augmented to £200. The whole of these funds were early applied at the sight of the Court of Teinds, on reports by the Teind Clerk. In calculating the

<sup>1</sup> For a list of these churches, see 15 & 16 Geo. V. c. 33, Tenth Sched.

<sup>2</sup> 15 & 16 Geo. V. c. 33, s. 10 (2).

<sup>3</sup> Part I., ss. 1–19.

<sup>4</sup> Sec. 3.

<sup>5</sup> Sec. 4.

<sup>6</sup> Sec. 7.

<sup>7</sup> *Cameron v. Chisholm-Batten*, 1869, 7 M. 565; *Jackson v. Cochran*, 1873, 45 Jur. 314.



deficiency the Court, on 18th December 1811, allowed £8, 6s. 8d. to be deducted in all cases from the teinds for communion elements. In later years, where teinds were discovered in certain of the parishes sufficient to meet, or in excess of, the amount paid by Exchequer, the grants were withdrawn by the Court and applied to other cases. The only case after the lapse of forty-six years in which the Court has had occasion to intervene was that of Newton-on-Ayr, where the minister was found entitled to an augmentation from local sources by the Court of Session <sup>1</sup>; and, on the application of the Procurator for the Church, the Teind Court recalled the grant of £90, made on 17th June 1812, and re-allocated it to the ministers of five parishes with stipends under £150.<sup>2</sup> At present the full amount of the Exchequer grants is exhausted.

774. By s. 39 of the Church of Scotland (Property and Endowments) Act, 1925,<sup>3</sup> the Scottish Ecclesiastical Commissioners, appointed under that Act, were directed to frame a scheme for the allocation by the Church of Scotland General Trustees of the various annual payments made from Exchequer, mentioned in the Seventh Schedule to the Act, and of the income from any capital sum or sums received by them in redemption of these annual payments, and for the payment by the General Trustees of the various amounts so allocated. The 1925 Act repealed the Teinds Act, 1810,<sup>4</sup> the Teinds Act, 1824,<sup>5</sup> the Act 5 Geo. IV. c. 90, and ss. 13 and 14 so far as these sections relate to payment of stipend, and ss. 23 and 24. The administration of these Exchequer payments is now regulated by the "Treasury Moneys Allocation Scheme" issued by the Commissioners under their Order of 21st June 1926.

#### SUBSECTION (7).—*Communion Elements.*

775. The Teind Commissioners have always been in use to modify a sum for communion elements, in addition to the minister's stipend, out of the teinds of the parish. The only Statute which expressly authorised this, 1641, c. 30, was rescinded at the Restoration. The minister is entitled to an allowance for the supply of bread and wine for the celebration of the Sacrament of the Lord's Supper twice in the year. The amount is generally fixed at the same time as the stipend is modified. There can, of course, be no increase in the allowance unless there is free teind in the parish. The amount is in the discretion of the Court. If the population of a parish does not exceed 2000 the Court will not allow more than £10 for communion elements, but there is no rule that, where the population is between 3000 and 5000, the Court will award £15. In a parish where the population was 4000 the Court on a consideration of the circumstances modified a sum of £12 for communion

<sup>1</sup> *Rainie v. Mags. of Newton-on-Ayr*, 1897, 24 R. 606.

<sup>2</sup> *Petr. Sir John Cheyne*, unreported, 8th July [1898].

<sup>3</sup> 15 & 16 Geo. V. c. 33.

<sup>4</sup> 50 Geo. III. c. 84.

<sup>5</sup> 5 Geo. IV. c. 72.

elements.<sup>1</sup> Regard is generally had to the population, and the following is the usual scale:—

Under 2000 . . . . .	£ 8 6 8
2000 to 3000 . . . . .	10 0 0
3000 to 5000 . . . . .	12 0 0
5000 to 10,000 . . . . .	15 0 0
Over 10,000 . . . . .	20 0 0

In exceptional cases of populous city parishes larger sums have been awarded, the maximum being £60 (St. Cuthbert's, Edinburgh; Barony, Glasgow). The allowance is modified in money payable at Whitsunday and Martinmas. It does not fall within the law of Ann or of vacant stipend. The minister receives the money in trust, and he is not entitled to make any surplus a source of personal emolument. The heritors cannot, indeed, demand repetition, but it is the duty of the minister to apply the surplus to pious uses within the parish.<sup>2</sup> The minister is not liable in income tax upon the money paid to him for communion elements, whether applied for that purpose or to other pious uses.<sup>3</sup>

#### SUBSECTION (8).—*Ann.*

**776.** A provision, known as Ann, Annat, or Annatine, is in certain cases due to the "executors" of a minister after his own right to stipend has terminated. As has already been stated<sup>4</sup> a minister becomes entitled to one-half of the stipend due for that year's crop by surviving the term of Whitsunday (15th May), and to the whole of the stipend due for that year's crop by surviving the term of Michaelmas (29th September). The Ann is a half-year's stipend in addition to the stipend which has vested at either of these terms.<sup>5</sup> Mackenzie<sup>6</sup> remarks that the Act of 1672, c. 13, was not well expressed in declaring that Ann belonged to the executors, for it belongs to the nearest of kin and the widow, because the Ann was of old introduced in favour of the nearest of kin,<sup>7</sup> "for Churchmen had no wives under Popery." It was all the more singular that the Act should have referred only to executors, since the rights of widows and children had been recognised in decisions of the Court from the year 1626 downwards.<sup>8</sup> The Act 1672, c. 13, had in view the extension of the provision to the next-of-kin of bishops, and the limitation of the Ann to a half-year's stipend.<sup>9</sup>

**777.** The benefit of Ann is supposed to have been conferred on the widow and children after the Reformation, following a German practice referred to by Erskine,<sup>10</sup> and more fully noticed by Lord President Inglis

<sup>1</sup> *Minister of Logie v. Heritors*, 1867, 6 M. 82.

<sup>2</sup> *Heritors of Strathmiglo v. Gillespie*, 1742, Mor. 2491.

<sup>3</sup> See *Jardine v. Inland Revenue*, 1907 S.C. 77.

<sup>4</sup> Para. 771, *supra*.

<sup>5</sup> Act 1672, c. 13, 24, Thomson's ed.; Mackenzie, *Observations*, 149.

<sup>6</sup> *Observations*, 150.

<sup>7</sup> Act, 1546, c. 4.

<sup>8</sup> Brown, *Synopsis*, S.V. "Ann," 84.

<sup>9</sup> Stair, ii. 8, 34.

<sup>10</sup> ii. 10, 66.

in *Latta v. Edinburgh Ecclesiastical Commissioners*.<sup>1</sup> Where there were no children, it was held that the Ann fell to be divided equally between the widow and next-of-kin.<sup>2</sup> The claim of the widow where there were children was held to be one-half, the other half going to the children.<sup>3</sup> Doubt was thrown upon this decision by Erskine,<sup>4</sup> but most writers approve of it.<sup>5</sup> Connell points out that the Ann is not a succession, and never belonged to the minister, and adds, "it has been justly decided that the widow gets half." It is important to note that the decision has been followed, and continues to be followed, in practice, both by the collector of the Church Schemes (who collects stipend provided by the Endowment Committee for *quoad sacra* parishes) and the collector of the Widows' Fund (who collects vacant stipend under the Act 54 Geo. III. c. 169). There is often great difficulty in tracing the next-of-kin, which suggests a doubt whether Ann should go further than the widow and children. When the scheme for the Ministers' Widows' Fund was instituted in 1744<sup>6</sup> the Ann was not touched. In a later Act, however, in 1778<sup>7</sup> it was provided that a sum of half the particular rate of the minister (or other contributor connected with the Universities) shall be payable out of the Ann where the Ann is by law competent, and where no Ann is competent the half-rate shall be paid by the contributor's heirs and executors. The highest rate is £7, 17s. 6d., so that a half-rate is not an excessive burden upon the Ann.

778. The Ann is payable out of all stipends, whether paid in money or victual. It has been held to be exigible in town charges,<sup>8</sup> and is allowed out of sums contributed by Exchequer to small livings under 50 Geo. III. c. 84, s. 16, and 5 Geo. IV. c. 90, s. 21. The vacant stipend in *quoad sacra* parishes falls to the Widows' Fund,<sup>9</sup> and in consequence of that decision Ann is also allowed. The ministers of *quoad sacra* parishes are bound to contribute to the Widows' Fund. In *Grant*<sup>10</sup> a first minister in a Parliamentary church was not held eligible, but in *Mac-lagan*,<sup>11</sup> in an ordinary *quoad sacra* parish, a first minister was held liable. The decision was followed by the Act 53 & 54 Vict. c. 124. The ordinary income from glebes is not subject to Ann<sup>12</sup>; but under the Glebe Lands (Scotland) Act, 1866,<sup>13</sup> it is provided that the Act 1672, c. 13, shall apply to the feu-duties and rents under the Act. It is thought that the provision also applies to interest on prices of glebes sold. The revenue in all cases under the Act arises from the authority to feu or lease being granted by the Court. When a sale takes place, it is only after the

<sup>1</sup> 1877, 5 R. 266.

<sup>2</sup> *Scrimgeour v. Murray's Exrs.*, 1663, Mor. 464; *Spence and Clerk v. Craig*, 1679, Mor. 465.

<sup>3</sup> *M'Dermel's Children v. Montgomery*, 1747, Mor. 464. <sup>4</sup> ii. 10, 67.

<sup>5</sup> Forbes on Tithes, 136; Buchanan, 430; Connell, ii. 93.

<sup>6</sup> For its origin and progress see Morren, Annals.

<sup>7</sup> 19 Geo. III. c. 20, s. 14.

<sup>8</sup> *Shiels Representatives v. Town of St. Andrews*, 1709, Mor. 466; *Hutchison v. Mags. and Town Council of Edinburgh*, 1747, Mor. 467.

<sup>9</sup> *Cheyne v. Cook*, 1863, 1 M. 963. <sup>10</sup> 1849.

<sup>11</sup> 1887 unreported.

<sup>12</sup> *Colvil v. Lord Balmerino*, 1665, Mor. 464.

<sup>13</sup> 29 & 30 Vict. c. 71, s. 15.

authority to feu, and the price, when invested, produces an income coming in place of the feu-duty.

**779.** The right to Ann emerges only on the death of a minister. Consequently Ann is not payable where the minister has demitted his charge or been deposed.<sup>1</sup>

While the stipend vested must be taken up by confirmation, the title to the Ann is complete by survivancy without confirmation, and it is not subject to the debts or deeds of the incumbent, for it never belonged to him.<sup>2</sup> It is not subject to the Apportionment Act, 1870.<sup>3</sup> And it cannot be subjected to the payment of an assistant and successor's stipend.<sup>4</sup>

**780.** By s. 9 of the Church of Scotland (Property and Endowments) Act, 1925,<sup>5</sup> it is provided (1) that neither the widow nor any other representative of any minister admitted after the passing of that Act to any benefice in the Church of Scotland shall be entitled to Ann; (2) that the foregoing provision shall, so far as respects any right in name of Ann to any stipend standardised under the provisions of the Act, apply to the widow and other representatives of any minister admitted before the passing of the Act where the benefice is deemed to have become vacant by election and the minister survives the date of standardisation by one year or more; and (3) that, save as expressly provided in the Act, nothing contained therein shall affect or be construed to affect the right which the widow or other representatives of a deceased minister has or have by the present law and practice to one half-year's stipend in name of Ann.

#### SECTION 7.—THE BEADLE.

**781.** Three separate functions are discharged by the beadle—service as (1) kirk-session officer; (2) minister's man, or personal attendant on the minister at church; and (3) doorkeeper of the church.

The law with reference to the office is somewhat uncertain; Duncan states the position in the following passage: "Ancient and universal as is the office, important as are its functions, and secure as is its place in literature, the legal authority as to the office, its subdivisibility, the right of appointment, and the sources of emolument are exceedingly meagre."<sup>6</sup>

#### SUBSECTION (1).—Duties.

**782.** The duties of a beadle have thus been summarised.<sup>7</sup> In his capacity of kirk-session officer the beadle is required to cite persons to appear before the session; to be in attendance when the session meets;

<sup>1</sup> *Archbishop of Glasgow v. the late Archbishop*, 1675, Mor. 15897.

<sup>2</sup> *Bairns of the Bishop of Galloway v. Couper*, 1628, Mor. 470; *Donaldson v. Brown*, 1694, Mor. 471.

<sup>3</sup> 33 & 34 Vict. c. 35; see *Latta v. Edinburgh Ecclesiastical Commrs.*, 1877, 5 R. 266.

<sup>4</sup> *Dow v. Imrie*, 1887, 14 R. 928.

<sup>6</sup> Duncan and Johnston, Par. Eccles. Law, 606.

<sup>5</sup> 15 & 16 Geo. V. c. 33.

<sup>7</sup> *Ibid.*, 606, 607.



and, as messenger, to perform various minor duties in connection with the despatch of its business. As minister's man he is in use to attend on the minister at the diets of public worship within the church; to place in, and remove from, the pulpit his Bible and Psalm-book; to provide water and napkins for baptisms; to assist in arranging the communion tables on the occasions when the Lord's Supper is dispensed; and to superintend other arrangements connected with the celebration of public worship. As doorkeeper the beadle is entrusted with the keys of the church. It is his duty to open the building for public worship on Sundays and on other appointed occasions. It is also his duty to afford to the parishioners, when duly required to do so, access to the building for such purposes as are not inconsistent with the uses to which it may be legally applied. He ought likewise to be in attendance at the church during the diets of worship.

#### SUBSECTION (2).—*Appointment.*

783. It has been laid down,<sup>1</sup> as decided by the case of *Magistrates of Elgin v. Minister and Kirk-Session*,<sup>2</sup> that the magistrates in a burghal parish, and consequently the heritors in a landward parish, are entitled to appoint the beadle. But this is in his capacity of doorkeeper (the *ostiarius* of the Mediæval Church) and guardian of the church building. As kirk-session officer the beadle is appointed by the session. Apparently it is not necessary that the kirk-session should employ the doorkeeper as their officer or as vergers or sacristans, although in practice they do so. In practice also, it is believed, the kirk-session officer always discharges the duties of minister's man. Accordingly, while in theory the three offices are distinct, in practice they are invariably united in one holder. The tenure of the office, whether under the heritors or under the kirk-session, is at the pleasure of his employers, and a beadle may be removed on due notice given.

#### SUBSECTION (3).—*Salary.*

784. Whilst the heritors appoint the doorkeeper, apart from special arrangement or custom, they are apparently under no definite obligation to pay him a salary. It does not appear that, in so far as he is the doorkeeper appointed by the heritors, the beadle has any claim for remuneration against the kirk-session (unless it be for fees immemorially in use to be paid on the occasion of marriages and baptisms). On the other hand, in so far as the beadle is in the employment of the kirk-session as their officer and as vergers, his claim for remuneration appears to rest on the ordinary principles of employment, either contract or *quantum meruit*. He is in use to receive remuneration in the

<sup>1</sup> *Kirk-Session of St. Andrew's, Edinburgh v. Town Council of Edinburgh*, 1835, 13 S. 391, at p. 395.

<sup>2</sup> 1740, Mor. 7916 and 13124.

form of customary dues levied by the kirk-session on the occasions of marriages and baptisms. He is often grave-digger also, and has emoluments in that capacity; and in some cases the heritors give him a small salary, while in others they maintain a house for him. Frequently, too, as session officer he receives a small salary from the church collection fund. Duncan cites the case of *Hamilton v. Minister and Kirk-Session of Cambuslang*<sup>1</sup> as authority for such payment, on the ground that, although the claimant there was the session-clerk, the principle is the same.<sup>2</sup>

## SECTION 8.—CHURCH FABRIC.

### SUBSECTION (1).—*Building and Repairing.*

**785.** The Church of Scotland (Property and Endowments) Act, 1925,<sup>3</sup> by transferring the parish churches in Scotland to the Church of Scotland General Trustees, has altered the old system under which these churches were provided and maintained. Prior to that Act the obligation to provide and maintain the parish church lay on the heritors of the parish, in whom the Church was vested in trust for the use of the parishioners in public worship.<sup>4</sup> This obligation had its source in various Statutes following on the Reformation, as interpreted by practice and decision.<sup>5</sup> In the case of Parliamentary churches the burden laid upon heritors was limited and was defined by Statute.<sup>6</sup> The question of providing a parish church (apart from repairing or rebuilding) might arise “when a new parish *quoad omnia* has been erected for which no building has been provided from other sources,”<sup>7</sup> but in modern practice the question was of little importance, since the providing of parish churches was invariably connected with the erection of parishes *quoad sacra*. In any case, the obligation to provide a church was of the same character and was ruled by the same principles as the obligation to maintain it. It included the providing of a bell,<sup>8</sup> as well as seats and other necessary furnishings,<sup>9</sup> the pew being twenty-nine inches wide, and eighteen inches laterally being allowed for each person.<sup>10</sup> There was no obligation to provide a steeple “except so far as was necessary for hanging the bell,” *i.e.* there need not be a steeple, but there must be a belfry.<sup>11</sup>

**786.** The heritors were bound to execute all necessary repairs, and it was often a question of difficulty to decide whether or not the dis-

<sup>1</sup> 1752, Mor. 16570.

<sup>2</sup> See Duncan and Johnston, *op. cit.*, 609; Black, Par. Eccles. Law, 245.

<sup>3</sup> 15 & 16 Geo. V. c. 33.

<sup>4</sup> *Duke of Roxburghe*, 1876, 3 R. 728, per Lord Pres. Inglis at p. 734; *Steel v. Kirk-Session of St. Cuthbert's Parish*, 1891, 18 R. 911, per Lord Pres. Inglis at p. 917.

<sup>5</sup> Rankine, *Land-Ownership*, 4th ed., 751.

<sup>6</sup> 5 Geo. IV. c. 90, s. 18.

<sup>7</sup> Rankine, *op. cit.*, 753.

<sup>8</sup> *Parish of Inverkeithing v. Lady Rosyth*, 1642, Mor. 7914.

<sup>9</sup> *Earl of Home*, 1777, 5 Brown Supp. 558.

<sup>10</sup> *Harlow v. Governors of Merchant Maiden Hospital*, 1802, 4 Pat. 356.

<sup>11</sup> *Earl of Home, supra*; *Mags. of Peebles v. Kirk-Session of Peebles*, 1875, 2 R. (H.L.) 117.

repair was such that the heritors ought to rebuild.<sup>1</sup> It was usual in such cases to take the probable cost involved as a practical test.<sup>2</sup>

The heritors could not be called upon to rebuild on the sole ground that the church had become inadequate to accommodate an increased population;<sup>3</sup> but, where the church was in such disrepair as to require rebuilding, then the new church had to be made sufficient to accommodate two-thirds of the examinable parishioners (*i.e.* those above twelve years old), according to the population of the parish at the time of rebuilding.<sup>4</sup> Where a church was rebuilt, it was necessary that the new church should be built upon the site of the old church or as near as possible to that site.<sup>5</sup> The plan and style was a matter for determination by the heritors, who were not obliged to consult the Presbytery, the interest of the latter body being confined to seeing that the proposed accommodation was adequate.<sup>6</sup> The Presbytery, however, could intervene if the heritors neglected their duty to rebuild or to repair.<sup>7</sup>

**787.** Prior to 1925 the duty of maintaining a burgh church lay upon the magistrates and town council of the burgh in which the church was situated. To assist in providing for their obligations in respect of stipend and of maintenance, the magistrates and town council were allowed to let the sittings in the church and to collect the seat-rents.

**788.** The repair of the Parliamentary churches was regulated by s. 18 of the Act 5 Geo. IV. c. 90, which provided that the heritor or any two of the heritors applying for the erection of such a church, and his or their successors in the lands situated within the district for which the church was set apart, should by such application be and become bound to keep and maintain the church in good and sufficient repair, provided that the seat-rents should be applied towards the repair of the church and manse in the first instance; and provided further that, after the application of the seat-rents, the expense to be defrayed by the applying heritor or heritors should not in any one year exceed 1 per cent. upon the amount of money originally expended in building or completing or purchasing the church, to which extent and no further the applying heritor or heritors should be compellable to repair the church in such manner as heritors were compelled to repair parish churches in Scotland.

**789.** *Quoad sacra* parish churches were built by voluntary subscription, and the repair of the fabrics of these churches fell naturally upon the congregations.

<sup>1</sup> *M'Leod v. Carment*, 1830, 8 S. 475; *Murray v. Presbytery of Glasgow*, 1833, 12 S. 191.

<sup>2</sup> *M'Leod v. Carment*, *supra*; *Murray v. Presbytery of Glasgow*, *supra*; *Bertram v. Presbytery of Lanark*, 1864, 2 M. 1406; Rankine, *Land-Ownership*, 4th ed. p. 754.

<sup>3</sup> *Cunninghame v. Deans*, 12th December 1811, F.C.; *Lord Lynedoch v. Smythe*, 1828, 6 S. 791; *Miller v. Earl of Glasgow*, 1834, 7 W. and S. 185.

<sup>4</sup> *Minister of Tingwall v. Heritors*, 1787, M. 7928; *Case of Lerwick*, 1820; Connell, *Par. Law*, Supp. 44; *M'Leod v. Carment*, *supra*.

<sup>5</sup> *Case of Falkirk*, 1809; Connell, *Par. Law*, Supp. 63.

<sup>6</sup> *Minister of Tingwall v. Heritors*, *supra*; *M'Neill v. Nicolson*, 1828, 6 S. 422.

<sup>7</sup> *Cunninghame v. Deans*, *supra*; *Minister of Dunning v. The Heritors*, 1807, Mor. App. "Kirk," No. 4.



**790.** It is now necessary to consider the provisions of the Act of 1925 with reference to the different kinds of churches.

By s. 28 any heritor concerned, or the Church of Scotland General Trustees, can obtain from the sheriff a certificate in the form set out in the Eleventh Schedule to the Act, containing a description of the church to which it relates, and setting forth that all obligations incumbent upon the heritors with respect to the church have been fulfilled. This certificate may be recorded in the appropriate Register of Sasines, and after it has been recorded, any liability or obligation incumbent upon any heritor in connection with the subjects to which the certificate relates shall be at an end, except the obligation or liability to assess or to be assessed for the repayment of any debt existing at the date of the certificate; and all rights of property in the subjects shall by virtue of the Act of 1925 and without the necessity of any further conveyance vest in and belong to the General Trustees, to the same effect as if a complete feudal title-holding of the Crown in free blench farm for payment of a penny Scots yearly, if asked only, had been duly constituted in favour of the General Trustees.

**791.** By s. 28 (4) it is provided that in parishes where town councils in their capacity as town councils, or other public bodies (whether statutory or otherwise) or kirk-sessions or persons were, under the law and practice existing at the time of the passing of the Act, or by Royal Warrant, charter, agreement, or custom, liable along with or in place of the heritors in obligations relating to the church, the Presbytery or the General Trustees or any other person concerned may apply to the sheriff to find and declare that the case ought to be dealt with by the Scottish Ecclesiastical Commissioners, and if the sheriff so finds and declares, the Commissioners shall as soon thereafter as conveniently may be inquire into all circumstances relating to existing obligations in respect of the fabric and site of such church and the maintenance of such fabric, and by order provide for the transfer to the Church of Scotland General Trustees of the fabric and site, and of all powers and duties with respect to the maintenance and repair of the fabric.

**792.** The Scottish Ecclesiastical Commissioners are directed after similar inquiry to make orders providing for the transfer to the General Trustees of (1) the fabrics and sites of the churches in the ten *quoad omnia* parishes, specified in the Eighth Schedule to the Act,<sup>1</sup> which were erected under the New Parishes (Scotland) Act, 1844<sup>2</sup>; and (2) the forty-three Parliamentary churches specified in the Tenth Schedule<sup>3</sup>; and of all powers and duties with respect to the maintenance and repair of the fabrics. By s. 22 the Scottish Ecclesiastical Commissioners are directed, after inquiry into all the circumstances, to frame schemes for the future ownership, maintenance, and administration of the burgh churches, as these are enumerated in the Ninth Schedule to the Act. Every such scheme has to make provision for the transfer to the General

<sup>1</sup> Sec. 24.

<sup>2</sup> 7 & 8 Vict. c. 44.

<sup>3</sup> Sec. 23.



Trustees of all rights of property vested in or belonging to the magistrates or the town council of any of the burghs within which the burgh churches are situated in the fabrics and sites of the burgh churches, and for the transfer to the General Trustees of the duty of maintaining any property so transferred.

**793.** *Quoad sacra* churches are transferred to the General Trustees<sup>1</sup> by means of an inventory prepared by them and certified by the Clerk of Teinds with respect to each parish. Such inventory has to specify (i) the name of the parish; (ii) each property or security forming part of the statutory properties and endowments of the parish; and (iii) the name or names of the person or persons in whom the same is vested. Upon such inventory in so far as it relates to heritable properties or securities being recorded in the appropriate Register of Sasines, the heritable properties and securities specified therein are deemed to be validly transferred to the General Trustees by virtue of the Act and without the necessity of any further conveyance.

As a result then of the passing of the Act of 1925 the fabrics of all the churches of the Church of Scotland are vested in the Church of Scotland General Trustees, upon whom now rests the duty of future maintenance.

#### SUBSECTION (2).—*Allocation of Seats in a Parish Church.*

**794.** The Church of Scotland (Property and Endowments) Act, 1925, enacts by s. 29 that on the expiry of one year from the date on which any *quoad omnia* church (other than the churches belonging to the ten *quoad omnia* parishes erected under the New Parishes (Scotland) Act, 1844) is by or in pursuance of the Act transferred to the Church of Scotland General Trustees, the right of allocating sitting accommodation in the church, whether with or without payment therefor, and the right of disposal of any proceeds therefrom shall belong to the kirk-session, or to such other body as the General Assembly may direct and any existing right to such accommodation shall cease and terminate. The Act (which does not deal with the letting of seats in *quoad sacra* parishes) also provides that the Scottish Ecclesiastical Commissioners shall make orders about seat-letting in the cases of burgh churches,<sup>2</sup> of Parliamentary churches,<sup>3</sup> and of the ten *quoad omnia* parish churches erected under the New Parishes (Scotland) Act, 1844.<sup>4</sup>

**795.** Prior to that Act the circumstances in which a person became entitled to a seat in a parish church, and the rules regarding the allocation and letting of seats differed according as the church was the church of a landward parish, of a burgh, of a landward-burghal parish, of a parish *quoad sacra*, or was a parliamentary church erected under the provisions of 4 Geo. IV. c. 79 and 5 Geo. IV. c. 90. The subject may therefore be considered under these heads.

<sup>1</sup> Sec. 34.

<sup>2</sup> Sec. 22.

<sup>3</sup> Sec. 23.

<sup>4</sup> Sec. 24 and Eighth Sched.

(i) *Landward Parish Church.*

796. In a landward parish the disposal of the area of the church lay with the heritors, not with the minister or the kirk-session.<sup>1</sup> The heritors might carry out the allocation by agreement, or by ordinary process before the sheriff, subject to review by the Court of Session.<sup>2</sup> Seats were set apart for the minister's family, the elders, and the poor.<sup>3</sup> Thereafter the heritors were entitled to select family seats (with full and ample accommodation for the family, excluding servants, and for guests), the order of choice being according to valuation. Then, by a second choice in the same order, they divided the rest of the area for the use of their tenants and dependants, but in such a manner that the total allotted to each heritor under the double choice was in proportion to his valuation.<sup>4</sup> When a church had never been regularly divided, any heritor could require a division to be made; and if there had been no division and no agreement among the parties, mere possession of a seat by a heritor, even for the prescriptive period, would not establish such a right as to bar a judicial division.<sup>5</sup> But where there had been long possession following on an agreement, this was presumptive proof of a regular and proper division.<sup>6</sup> The question of possession in such cases is discussed by Lord Neaves in *Duke of Abercorn v. Presbytery of Edinburgh*.<sup>7</sup> Such allocation had to be made in the church of a new parish erected *quoad omnia*.<sup>8</sup> The allocation was made according to the rights of the heritors at the time of making, and it seems that there was power to give accommodation in the new church to parties who had it by agreement in the old church, though they had not the qualification of heritor or parishioner.<sup>9</sup> The heritor was obliged to allot his sittings among his tenants—a proceeding which was subject to revision by the sheriff; and where a property was divided, it might be necessary to divide the sittings effeiring to it.<sup>10</sup>

797. The allocation, once made, was final so long as the building remained. It was only if the church was rebuilt that a new allocation could be made. When the church was merely repaired (no matter how extensive the repairs were), no re-allocation of seats was competent.<sup>11</sup> Accordingly, if there was excambion of a church already built (and repairable) for a new church, the area of the new church had to be divided on the same footing as that of the old church.<sup>12</sup>

<sup>1</sup> *Heritors of Faulkland v. Minister and Kirk-Session*, 1739, Mor. 7916.

<sup>2</sup> Duncan, Par. Law, iii.; Black, Par. Ecc. Law, 2nd ed., 66.

<sup>3</sup> Dunlop, Par. Law, 41.

<sup>4</sup> *Earl of Marchmont v. Earl of Home*, 1776, Mor. App., "Kirk," No. 2; *Walker v. Earl of Zetland*, 1848, 10 D. 1378.

<sup>5</sup> *Wemyss v. Earl of Morton*, 1838, 16 S. 332.

<sup>6</sup> *Cathcart v. Weir*, 1785, Mor. 7928; *Smith v. Crawford*, 1826, 4 S. 738.

<sup>7</sup> 1870, 8 M. 733.

<sup>8</sup> *Reid v. Commrs. of H.M. Woods and Forests*, 1850, 12 D. 1211.

<sup>9</sup> *Gavin v. Trinity House of Leith*, 2nd June 1825, F.C.

<sup>10</sup> Rankine, *op. cit.* 186.

<sup>11</sup> Per Lord Neaves in *Duke of Abercorn v. Presbytery of Edinburgh*, *supra*; *Stiven v. Heritors of Kirriemuir*, 1878, 6 R. 174; *Duke of Roxburghe v. Millar*, 1877, 4 R. (H.L.) 76.

<sup>12</sup> *Duke of Roxburghe v. Millar*, *supra*.

**798.** As the heritors were proprietors of the area of the church only in trust, there could be no exclusive right of property in a kirk-sitting.<sup>1</sup> "Proprietors, both large and small, hold sittings, not absolutely in property, but in trust for themselves and the persons on their estates, and therefore it is that sittings cannot be disjoined from the properties, because, if they were, it would be a breach of trust on the part of the proprietors."<sup>2</sup> The church-seat was carried by a disposition of the lands as part and pertinent.<sup>3</sup> From this conception of the area of the church as held in trust, it followed that the lease of land in the parish implied right to accommodation for the tenant in the part of the area allocated to the landlord.<sup>4</sup> On the same principle, traffic in seats, even for a laudable object, was illegal, as involving breach of trust.<sup>5</sup>

(ii) *Burgh Church.*

**799.** In a burghal parish the magistrates, as representing the community, were the heritors, and the allocation of seats rested with them. They had power to charge seat-rents which, however, had to be applied solely in defraying ecclesiastical charges, including the upkeep of the burgh church.<sup>6</sup> It was not legal to apply the proceeds of the seat-rents to the general purposes of the burgh.

(iii) *Landward-Burghal Parish Church.*

**800.** In the case of mixed parishes two alternatives were open, *videlicet*:—(a) the area of the church might be divided into two portions, one for the landward part and the other for the burghal part. The portion thus assigned to the burgh was then allocated among the inhabitants according to the real rents, and not as in purely burghal parishes, because in a mixed parish the burgh did not contribute to the upkeep of the church in its corporate capacity, but the assessment fell on the individual inhabitants according to their properties<sup>7</sup>; or (b) the sittings might be allocated to the whole parish on the basis of real rent without distinguishing between the landward and the burghal portions, *i.e.* as if there was no burgh in the parish.

(iv) *Quoad Sacra Church.*

**801.** The distribution of seats is regulated by the New Parishes (Scotland) Act, 1841.<sup>8</sup> One pew is to be set aside, rent free, for the minister and his family, and another for the officiating elders. With regard to the

<sup>1</sup> *St. Clair v. Alexander*, 1776, Mor. App., "Kirk," No. 1.

<sup>2</sup> Per Lord Pres. Inglis in *Stephen v. Anderson*, 1887, 15 R. 72; *Duke of Roxburghe*, 1876, 3 R. 728, at p. 734; *Steel v. Kirk-Session of St. Cuthberts Parish*, 1891, 18 R. 911.

<sup>3</sup> *Duff v. Brodie*, 1769, Mor. 9644.

<sup>4</sup> *Skirving v. Vernor*, 1796, Mor. 7930.

<sup>5</sup> *Mackay v. Wood*, 1889, 17 R. 38.

<sup>6</sup> *Clapperton v. Mags. of Edinburgh*, 1840, 2 D. 1385.

<sup>7</sup> *Sinclair v. Mags. and Town Council of Kinghorn*, 1761, Mor. 7918; *Duke of Argyle v. Rowat*, 1775, Mor. 7921; *The Feuars of Crieff v. The Heritors*, 1781, Mor. 7924.

<sup>8</sup> 7 & 8 Vict. c. 44, s. 9.



rest of the sittings, it is provided that a portion of the sittings, to be determined by the sheriff of the county, and not exceeding one-tenth of the whole number, shall be set apart as free seats; another portion, not exceeding one-fifth of the whole sittings, shall be let at rents not exceeding a rate to be fixed by the presbytery of the bounds; and the remaining portion may be let in such manner as shall be agreed upon by the minister for the time being and the person or persons liable for the repair of the church and for the stipend of the minister, or, in case of their not agreeing, then in such manner as shall be determined by the Sheriff of the county. The rents may be applied for the purpose of defraying the necessary expenses of a precentor, beadle, or kirk officer, and other expenses necessarily incurred in dispensing the ordinances of religion therein, and for the upkeep of the church and manse, or for the relief of any person liable to uphold the same, or liable for the endowment or stipend provided to the minister, provided that the sum received by any such person shall not in any year exceed the sum paid or expended by him in the same year by reason of such liability.

(v) *Parliamentary Church*.<sup>1</sup>

802. The original regulations regarding the allocation of pews are to be found in 5 Geo. IV. c. 90, ss. 18 to 22. Shortly stated, they are as follows: One-third part of the church is to be set aside as free sittings, and free pews are to be provided for the heritor who undertakes wholly, or principally, the liability for the repair of the church, for the minister's family, and for the officiating elders. The remaining sittings may be let at a rent not exceeding 2s. 6d. per annum for each sitting, payable in advance. The proceeds are to be devoted to the repair and upkeep of the church and manse; and in the event of a greater sum than £20 accumulating in the hands of the minister and elders, they are required to pay it into the Bank of Scotland or other chartered bank in the name of any two of themselves appointed for that purpose. The manner of letting the pews is that agreed upon by the heritor, or heritors, undertaking liability for the repair of the building, and the minister for the time being. In the event of failure to reach agreement, they must bring the matter before the Sheriff, who reports to the Commissioners appointed under the Act, and they settle the manner of letting the seats.

SUBSECTION (3).—*Use of the Church*.

803. The church and its appurtenances could be used only for purposes consistent with the trust under which the heritors held it. "Parish churches are exclusively appropriated for divine worship, or for the religious education of the poor, or for parochial meetings of the heritors or parishioners, relative to the interests of religion, or of charity, or of education in the parish,"<sup>2</sup> unless "in the case of extraordinary

<sup>1</sup> 4 Geo. IV. c. 79, and 5 Geo. VI. c. 90.

<sup>2</sup> Per Lord Cuninghame (Ordinary) in *Easson v. Lawson*, 1843, 5 D. 1430.



necessity.”<sup>1</sup> Accordingly, interdict was granted even against a public meeting “to explain the present position of the church and enforce her missionary and other schemes.”<sup>2</sup> In *Kirk-Session of St. Andrew’s, Edinburgh v. Town Council of Edinburgh*,<sup>3</sup> interdict was granted against holding a meeting of municipal electors in a church.<sup>4</sup> Burial in churches was forbidden by the General Assembly. The bells of the parish church cannot be rung to assemble other congregations than its own, though by consent or usage they may be rung for other public purposes.<sup>5</sup>

### SECTION 9.—MANSE.

#### SUBSECTION (1).—*The Law before 1925.*

**804.** Prior to the Act of 1925<sup>6</sup> the ministers of landward parishes and of parishes partly landward and partly burghal were entitled to have manses provided for them by the heritors. Before 1560 neither parishioners nor heritors appear to have been bound to erect or repair the manses of the clergy, this obligation falling on the latter themselves.<sup>7</sup> Various Statutes were passed in the latter part of the sixteenth and during the seventeenth centuries and the right of a minister to a manse ultimately came to rest on the Act 1663, c. 21, which enacted with reference to “providing” manses (in the case where no manse had formerly been set aside): “That the heritors of the parish shall, at the sight of the bishop of the diocese (the jurisdiction thus conferred upon bishops is now transferred and exercised by Presbyteries) or such ministers as he shall appoint, with two or three of the most discreet men of the parish, build competent manses to their ministers, the expenses thereof not exceeding £1000 (Scots), and not being beneath 500 merks.” This Act definitely established the right of ministers of landward parishes to have a manse provided for them, and that of ministers of parishes partly landward and partly burghal was clearly settled by a long series of decisions.<sup>8</sup> In the case of *Downie v. Maclean*<sup>9</sup> the Lord Justice-Clerk (Moncreiff) said: “It is conceded that the minister of a parish partly burghal and partly landward is entitled to be provided with a manse, and if so, that his right rests on Statute.” In the case of a collegiate charge it may be taken that the first minister was entitled to a manse,<sup>10</sup> but that the right did not generally extend to the second minister.<sup>11</sup> The claim of the first minister was not excluded where the second minister obtained decree against the heritors for a manse.<sup>12</sup>

<sup>1</sup> Per Lord Mackenzie in *Easson v. Lawson*, 1843, 5 D. 1430.

<sup>2</sup> Per Lord Cuninghame (Ordinary), *supra*.

<sup>3</sup> 1835, 13 S. 391.

<sup>4</sup> *Cp.* also *Duke of Richmond v. Earl of Fife’s Trs.*, 1844, 6 D. 701.

<sup>5</sup> *M’Naughton v. Mags. of Paisley*, 1835, 13 S. 432; *Mags. of Peebles v. Kirk-Session of Peebles*, 1875, 2 R. (H.L.) 117.

<sup>6</sup> Church of Scotland (Property and Endowments) Act, 1925, 15 & 16 Geo. V. c. 33.

<sup>7</sup> *Heritors of Elgin v. Troop*, 1769, Mor. 8508, 1 Hailes 283.

<sup>8</sup> *Minister v. Heritors of Dunfermline*, 1812, 5 Pat. 593; *Mags. of Ayr v. Auld*, 1825, 4 S. 99, revd. 2 W. and S. 600.

<sup>9</sup> 1883, 11 R. 51.

<sup>10</sup> *Heritors of Elgin v. Troop*, *supra*.

<sup>11</sup> *Adamson*, 14th February 1816, F.C.

<sup>12</sup> *Carnegie v. Speid*, 1849, 11 D. 1250.

**805.** The burden of the maintenance of manse was also laid on the heritors by the Statute 1663, c. 21, which enacted: "And where competent manse are already built, ordains the heritors of the parish to relieve the minister and his executors of all cost, charges, and expenses for repairing of the foresaid manse; declaring hereby that the manse being once built and repaired, and the building and repairing satisfied and paid by the heritors in manner foresaid, the said manse shall thereafter be upholden by the incumbent ministers during their possession. . . ." Thus a minister was entitled at his entry to have his manse put into a proper state of repair by the heritors, but thereafter the latter were entitled to have it declared a "free" manse. This was a technical term denoting that the manse was decerned and declared by the Presbytery to be a sufficient residence for the minister both as regards thoroughness of repair and amount of accommodation.<sup>1</sup> The effect of such a declaration was to burden the incumbent with ordinary repairs. A statutory provision in 1868 made it competent for a Sheriff on the motion of any heritor to declare a manse free.<sup>2</sup>

**806.** The question of whether a manse could be repaired or required to be rebuilt was always one of circumstances, but the Court would never sanction a new manse if the existing one could be repaired.<sup>3</sup> The determination of what might be deemed a sufficient manse naturally depended almost entirely on the standard of comfort in the district at the time. A manse has been held to include in addition to dwelling-house, stable, barn, byre, and garden, a washing-house, poultry-house, pig-sty, garden wall, and force-pump for water where necessary.<sup>4</sup> When a minister was excluded from his manse owing to rebuilding or repairing operations, he was entitled to an allowance from the heritors as manse rent or "mail." This claim required to be made good in the Civil Courts and the summons had to conclude against each heritor for his proportion of the rent. An opinion has been expressed that it was incompetent for a Sheriff or a Presbytery to ordain a parish minister to reside in the manse,<sup>5</sup> and it has been held that a minister has a right to let his manse.<sup>6</sup>

**807.** Liferenters<sup>7</sup> and superiors<sup>8</sup> were not regarded as heritors *quoad* the obligations of building and repairing manse. In a parish partly landward and partly burghal, the magistrates of the burgh, along with the heritors of the landward district, were liable in the upkeep of the manse.<sup>9</sup>

<sup>1</sup> Ersk. ii. 10, 58; Cook, Church Styles, 200.

<sup>2</sup> Ecclesiastical Buildings and Glebes (Scotland) Act, 1868 (31 & 32 Vict. c. 96), s. 12; *Heritors of Pitsligo v. Gregor*, 1879, 6 R. 1062.

<sup>3</sup> *Heritors of Balfron v. Niven*, 1858, 1 M. 324; *Heritors of Kingoldrum v. Haldane*, 1863, 1 M. 325.

<sup>4</sup> Duncan, Johnston's ed., 374, 375.

<sup>5</sup> *Heritors of Pitsligo v. Gregor* (*supra*).

<sup>6</sup> *Heritors of Aberdour v. Roddick*, 1871, 10 M. 221.

<sup>7</sup> *Minister of Morham v. Binston*, 1679, Mor. 8499; *Anstruther v. Anstruther*, 1823, 2 S. 306.

<sup>8</sup> *Dundas v. Nicolson*, 1778, Mor. 8511; Hailes, 802.

<sup>9</sup> *Lockhart v. Mags. of Lanark*, 1832, 10 S. 243; *Mags. of Elgin v. Gatherer*, 1841, 4 D. 25.

**808.** Until 1926 a minister was not liable for poor rates in respect of a manse in his own occupation. This was a personal privilege of ministers as a class and did not attach to manses apart from their occupation by ministers.<sup>1</sup> The exemption here referred to was abolished by the Rating (Scotland) Act, 1926.<sup>2</sup> Under the Education (Scotland) Act, 1872,<sup>3</sup> a minister is assessed for school rates in respect of his manse and glebe, and he is also liable for road assessment.<sup>4</sup>

SUBSECTION (2).—*Effect of 1925 Act.*

**809.** The Act of 1925 contains provisions to effect the transfer of rights of property in manses to the General Trustees and the extinction of all further liability of heritors both for the provision and repair thereof. As regards manses of old parishes this is provided for by s. 28 of the Act, manses being dealt with in exactly the same way as churches. The General Trustees are entitled to have the buildings put once finally into a reasonable state of tenantable repair by the heritors and, failing agreement as to this, may apply within three years of the date of the Act to the Sheriff for an order on the heritors to execute such repairs as he considers necessary. The Sheriff's decision is final. Thereafter any heritor concerned or the General Trustees may apply to the Sheriff for a certificate that all obligations incumbent on the heritors with regard to a manse have been fulfilled. The recording of such a certificate in the appropriate Division of the General Register of Sasines has the effect of terminating all further liability or obligation incumbent on any heritor in connection with the manse in question, except the liability to be assessed for any existing debt. The recording of the certificate has also the further effect of vesting the subjects described in it in the General Trustees as if a feudal title-holding of the Crown in free blench farm for payment of a penny Scots yearly, if asked only, had been constituted in their favour.

**810.** It is further directed in the Act that schemes framed by the Scottish Ecclesiastical Commissioners should make provision for the transfer to the General Trustees of the manses of burgh parishes,<sup>5</sup> Parliamentary parishes,<sup>6</sup> and certain parishes *quoad omnia*<sup>7</sup> erected under the New Parishes (Scotland) Act, 1844,<sup>8</sup> and of the duty of maintaining them. The precise circumstances now governing the ownership and maintenance of these various manses can be found in the different schemes dealing with them. Any manses attaching to *quoad sacra* parishes as well as any endowments for their maintenance also fail to be transferred to the General Trustees under s. 34 of the 1925 Act.

<sup>1</sup> *Hogg v. Parochial Board of Auchtermuchty*, 1880, 7 R. 986; *Gillanders v. Campbell*, 1884, 12 R. 309.

<sup>2</sup> 16 & 17 Geo. V. c. 47, s. 2 (4).

<sup>3</sup> *Cowan v. Gordon*, 1868, 6 M. 1018.

<sup>4</sup> Sec. 23.

<sup>5</sup> Sec. 24.

<sup>6</sup> 35 & 36 Vict. c. 62.

<sup>7</sup> Sec. 22.

<sup>8</sup> 7 & 8 Vict. c. 44.



## SECTION 10.—GLEBE.

SUBSECTION (1).—*Nature of Glebe.*

**811.** The minister of every civil landward parish, and the minister of the first charge (if there be more than one) of a burghal parish with a landward district attached to it,<sup>1</sup> is entitled, in addition to half an acre for manse, offices, and garden, to a glebe of four acres Scots (equal to about five acres imperial) of arable land, and alternatively to sixteen souns of pasture land—a soun being sufficient to provide grazing for one cow. Four acres is the minimum extent for an arable glebe, and for every acre short of this, four souns of pasture land fall to be designed. The lands primarily liable to be set apart as glebe are kirk lands lying nearest the kirk; failing such, the glebe will be designed out of temporal lands.

**812.** It is not clear when glebes were conferred originally, but there is abundant evidence that, centuries prior to the Reformation, a portion of ground was assigned to each parson, even before provision was made for a dwelling-house or manse. The ancient Statutes relating to glebes are:—1563, c. 72; 1572, c. 48; 1592, c. 118; 1593, c. 165; 1606, c. 7; 1644, c. 31; 1649, c. 45; and 1663, c. 21. The more modern Acts are: the Small Stipends Act, 1824;<sup>2</sup> the Glebe Lands Act, 1866;<sup>3</sup> the Ecclesiastical Buildings and Glebes Act, 1868;<sup>4</sup> the United Parishes Act, 1876,<sup>5</sup> which is applicable to a united parish in which there is more than one glebe, and from which united parish a portion has been disjoined and erected into a parish *quoad sacra*; and the Church of Scotland (Property and Endowments) Act, 1925.<sup>6</sup>

**813.** Until the passing of the Church of Scotland (Property and Endowments) Act, 1925,<sup>6</sup> the glebe of an ordinary civil parish was held without any written title, and was termed allodial. By that Act,<sup>7</sup> however, as stated above, the Scottish Ecclesiastical Commissioners were directed to make orders providing, *inter alia*, for the transfer to and vesting in the Church of Scotland General Trustees of the ownership of the glebes. If properly designed, glebe lands are not subject to teind.<sup>8</sup> They were formerly, but are no longer, exempt from poor rates,<sup>9</sup> and are assessable for school rates.

**814.** The Act of 1866 proved to be a source of substantial benefit to the Church, many glebes having been dealt with during the years which have since elapsed. Under the law, prior to 1866, glebe lands could not be feued or leased except by means of a private Act of Parliament. The glebes of St. Cuthbert's (Edinburgh) and Govan were feued in virtue of special parliamentary powers. The practice of the Court of Teinds was

<sup>1</sup> *Mags. of Arbroath v. Presbytery of Arbroath*, 1883, 10 R. 767; *Alpine v. The Heritors of Dumbarton*, 1907 (O.H.), 15 S.L.T. 489; 45 S.L.R. 63.

<sup>2</sup> 5 Geo. IV. c. 72.

<sup>3</sup> 29 & 30 Vict. c. 71.

<sup>4</sup> 31 & 32 Vict. c. 96.

<sup>5</sup> 39 Vict. c. 11.

<sup>6</sup> 15 & 16 Geo. V. c. 33.

<sup>7</sup> *Ibid.*, s. 30.

<sup>8</sup> Act, 1578, c. 6.

<sup>9</sup> 16 & 17 Geo. V. c. 47, s. 2 (4).



to authorise feuing on the application of the minister, who must previously have obtained the approval of his presbytery, followed by the consent of two-thirds at least in value of the owners of land in the parish, the minimum ownership entitling a heritor to jurisdiction being £100 a year. On judicial authority to feu or lease being granted, and the minimum feuing rate or rent fixed, any proprietor whose lands were conterminous with the glebe might, within thirty days of the date of leave to feu or lease, intimate his willingness to acquire the whole or part of the glebe dealt with on such terms as the Court might determine; but any such offer had to be unconditional.<sup>1</sup> If the pre-emptive right was exercised by such owner taking the lands in feu, he would (unless it was arranged otherwise) fall to pay the usual duplicand every nineteenth year. The form of charter sanctioned for glebe-feuing contained a duplication clause; so that the Conveyancing Act, 1874, notwithstanding that provision, was binding upon anyone exercising the right of pre-emption, and that without express stipulation.<sup>2</sup> This seems to have arisen from the fact that the Court, not the minister or superior, fixed the terms on which the adjoining owner might acquire in feu. No fine or grassum was to be paid, but the full annual value of the ground feued or leased must be specified in the charter or the building lease. The purpose to which duplicands were primarily applicable was the extinction of the costs, charges, and expenses necessarily incurred in obtaining leave to feu, and in constructing roads, drains, etc. After all such debt affecting the *dominium directum* has been paid off, future duplicands will be payable to the minister for the time being as part of his stipend.

**815.** Unless the minerals in a glebe had been leased prior to an application for leave to feu, the Court would not allow these to be reserved, in respect that underground operations might so injuriously affect the buildings erected as seriously to impair the security for the feu-duties. Presumably the feuar should, for the like reason, be prohibited by his charter from working the minerals, or from conveying them to the proprietor of an adjoining mineral field.

**816.** When a portion of glebe lands is acquired by the heritors, for the purposes of sepulture, the ground must be purchased out and out. It seems unnecessary, here, to refer to the various modes of investing glebe moneys which have received judicial sanction. It may, however, be pointed out that, where part of a glebe has been acquired, not by virtue of the Act of 1866, but in terms of the Lands Clauses Consolidation Act, 1845, the consigned price is dealt with by the Court of Session (not the Court of Teinds), on the application of the minister with consent of the heritors and the presbytery. By the 1925 Act, however, the Church of Scotland General Trustees have now the control of such investments under the orders pronounced by the Scottish Ecclesiastical Commissioners.

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<sup>1</sup> *Fogo*, 1868, 7 M. 88, *Glebe of Row*.

<sup>2</sup> *M'Laren*, unreported, 15th July 1878, *Glebe of Fraserburgh*.

**817.** By the Church of Scotland (Property and Endowments) Act, 1925,<sup>1</sup> s. 31, where the glebe or any part thereof has been feued to the proprietors of conterminous lands, in terms of s. 17 of the Glebe Lands (Scotland) Act, 1866, and the feu-duty payable therefor has been transferred to the Church of Scotland General Trustees by an order made by the Scottish Ecclesiastical Commissioners, such proprietors or their successors are entitled to redeem the feu-duty (a) on terms settled by agreement, or (b) at any term of Whitsunday or Martinmas after three months' notice either (1) by payment to the Church of Scotland General Trustees of such a sum as would, if invested at the time of payment in consolidated  $2\frac{1}{2}$  per cent. annuities, produce an annual sum equal to the feu-duty; or (2) by transfer to the trustees of such an amount of consolidated  $2\frac{1}{2}$  per cent. annuities as would produce an annual sum equal to the feu-duty. On the death of a minister, whose incumbency is unaffected by the 1925 Act, the feu-duties and rents payable under the 1866 Act are subject to Ann.<sup>2</sup>

**818.** The crop on the glebe at the minister's death, or on his translation to another charge, belongs to his representatives or to himself, as the case may be. Should the glebe be let, the rent for the period to which the crop sown at the termination of the minister's incumbency applies belongs to him or (failing him) to his representatives.<sup>3</sup>

The minister may dig peats and cut down trees on the glebe; he may also lease the subjacent minerals; but he is not entitled to more than the income derived from the invested rents or lordships.<sup>4</sup> Where the Court authorised the sale of minerals in glebe lands, the price obtained was ordered to be invested for behoof of the minister and his successors in the benefice.<sup>5</sup>

**819.** Excambions of glebe lands have frequently taken place, for which the authority of the Presbytery was indispensable, and it was at least expedient, although not actually necessary, that the heritors' consent be also sought.<sup>6</sup>

#### SUBSECTION (2).—*Minister's Grass.*

**820.** What is known as minister's grass must not be confused with "Grass Glebe." The first statutory provision of the former was made in 1649, which ordained<sup>7</sup> that "every minister have a horse and two kyes grass, and that by and attour his gleib." The grass glebe, on the other hand, is the substitute for the statutory arable glebe of four acres in parishes where there is no arable land liable to designation, or not sufficient for a glebe of the full extent, lying adjacent to the kirk.

<sup>1</sup> 15 & 16 Geo. V. c. 33.

<sup>2</sup> See para. 778, *supra*.

<sup>3</sup> *Taylor v. Stewart*, 1853, 2 Stuart 538.

<sup>4</sup> *Minister v. Heritors of Newton*, 1807, Mor. "Glebe," App. 6.

<sup>5</sup> *Minister v. Heritors of Tranent*, 1909 S.C. 1242; 2 S.L.T. 88.

<sup>6</sup> As to title in excambion, see *Cadell v. Allan*, 1905, 7 F. 606.

<sup>7</sup> C. 45.

**821.** Minister's grass is over and above the glebe (arable or pastoral, as the case may be); and although this originally fell to be designed out of temporal lands, the Act of 1663, c. 21, provided that it should be "designed out of kirk lands," and that "if there be no kirk lands lying near the minister's manse out of which the grass for one horse and two kine may be designed, or otherways, if the said kirk lands be arable land, in either of those cases ordains the heritors to pay to his minister and his successors yearly the sum of £20 Scots . . . the heritors always being relieved, according to the law standing, off other heritors of kirk lands in the said paroch." No specific distance from the manse is here stated, and the question of nearness would thus appear to emerge only where in a parish there are two or more tracts of kirk lands. The provision of £20 Scots is obviously made for the benefit, not of the heritor possessing kirk lands lying in grass, but of the minister, who may elect whether he will have the money-equivalent in place of grass at an inconvenient distance from his house. If there be two tracts of grass land in the parish, that nearest the manse will be designated, the holder of it seeking partial relief from such heritors as possess kirk lands lying more remote. The surrogatum of £20 Scots per annum cannot be increased.<sup>1</sup> Once the money-substitute is accepted with the Presbytery's sanction, the right to "grass" is effectually excluded.<sup>2</sup>

#### SUBSECTION (3).—*Effect of 1925 Act.*

**822.** Under the Church of Scotland (Property and Endowments) Act, 1925,<sup>3</sup> the property in glebes is transferred to the Church of Scotland General Trustees. The expression "glebe" is defined in the Act<sup>4</sup> as meaning "the lands appropriated to a minister as his glebe, and shall be deemed to include grass glebe or minister's grass, servitudes, right of pasturage, or other heritable rights belonging to the minister and forming part of the benefice, or any money payments in use to be made to the minister in respect of the said rights or any of them, and any land settled in perpetuity on the minister for the time being." The Act deals separately with the transfer of glebes in (1) *quoad sacra* parishes<sup>5</sup> (other than those erected under s. 14 of the New Parishes (Scotland) Act, 1844<sup>6</sup>); (2) Parliamentary parishes<sup>7</sup>—the parishes to which s. 14 of the 1844 Act applies; and (3) *quoad omnia* parishes.<sup>8</sup>

**823.** In the case of *quoad sacra* parishes where a glebe has been permanently provided as part of the endowment of the minister of the parish under the New Parishes (Scotland) Act, 1844,<sup>9</sup> the United Parishes (Scotland) Act, 1868,<sup>10</sup> and the United Parishes (Scotland) Act, 1876,<sup>11</sup> upon recording in the appropriate Register of Sasines an

<sup>1</sup> *Carfrae v. Heritors of Dunbar*, 13th May 1814, F.C.

<sup>2</sup> *Minister of Dollar v. Duke of Argyle*, 9th July 1807, F.C.; and *Mor. "Glebe,"* App. 7.

<sup>3</sup> 15 & 16 Geo. V. c. 33.

<sup>4</sup> *Ibid.*, s. 47.

<sup>5</sup> 7 & 8 Vict. c. 44.

<sup>6</sup> 15 & 16 Geo. V. c. 33, s. 34.

<sup>7</sup> *Ibid.*, s. 23.

<sup>8</sup> *Ibid.*, s. 50.

<sup>9</sup> 7 & 8 Vict. c. 44.

<sup>10</sup> 31 & 32 Vict. c. 30.

<sup>11</sup> 39 & 40 Vict. c. 11.



inventory setting forth, *inter alia*, each property or security forming part of the statutory properties and endowments of the parish, the heritable properties and securities so specified are by virtue of the 1925 Act, and without the need of any further conveyance, to be deemed and taken to be validly transferred to the Church of Scotland General Trustees as if a disposition or assignation by the person or persons in whom such heritable properties or securities were vested had been granted in favour of the General Trustees and had been recorded in the appropriate Register of Sasines.<sup>1</sup>

824. In the case of Parliamentary parishes—the parishes to which s. 14 of the 1844 Act applies—the glebes are to be transferred by order of the Scottish Ecclesiastical Commissioners.<sup>2</sup>

825. The following provisions govern the transfer of the glebes in *quoad omnia* parishes. The clerk of every Presbytery is required within one year after the passing of the 1925 Act (*i.e.* by 28th May 1926) to furnish to the Scottish Ecclesiastical Commissioners a list of the glebes appropriated to the ministers of the parishes in the Presbytery, and of any cases where a minister has accepted or is entitled to any annual payment in place of glebe, and at the same time to intimate in which cases (if any) it is claimed by the Presbytery (whether on the representation of the minister concerned or otherwise) that the heritors concerned have not fully implemented the obligations incumbent upon them according to the present law and practice with respect to the provision and enlargement of a glebe.<sup>3</sup> As soon as conveniently may be after the receipt of these lists from the Presbytery clerks, the Commissioners are directed to inquire into all circumstances relating to existing rights of property in the glebes, and in any payments in place of glebe, and thereafter to make orders relating to the glebes and payments.<sup>4</sup> Every such order shall make provision for (a) the implement by the heritors of any obligations incumbent upon them with respect to the provision and enlargement of a glebe which have not already been implemented; (b) the transfer to and vesting in the Church of Scotland General Trustees of the ownership of the glebes; (c) the preservation of the existing rights of all persons other than the heritors or the minister of the parish who, under or in pursuance of any general or local Act of Parliament or otherwise, have acquired any right in any glebe or any part thereof, whether as purchasers, feuars, or tenants, and the payment of any feu-duties, casualties, or rent to the General Trustees in place of the minister; (d) the manner in which (1) any burden upon the glebe created under s. 18 of the Glebe Lands (Scotland) Act, 1866;<sup>5</sup> and (2) any of the costs, charges, and expenses referred to in that section which have not been made a burden on the glebe may be dealt with, discharged and extinguished; (e) the transfer to the General Trustees of any feu-duties and Government or other securities or investments

<sup>1</sup> 15 & 16 Geo. V. c. 33, s. 34.

<sup>1</sup> *Ibid.*, s. 30 (2).

<sup>2</sup> *Ibid.*, s. 23.

<sup>5</sup> 29 & 30 Vict. c. 71.

<sup>3</sup> *Ibid.*, s. 30 (1).



representing the price or consideration received for any glebe or part thereof or right therein under or in pursuance of the Glebe Lands (Scotland) Act, 1866,<sup>1</sup> the Feudal Casualties (Scotland) Act, 1914,<sup>2</sup> or any other general or local Act of Parliament, or any decree of the Court of Teinds, or any grant or contract validly made by a minister and held by any persons acting as trustees in trust for the payment of the income to the minister of the parish; (f) the conversion into a money payment of any right of pasturage over any lands which is possessed by the minister as minister of the parish, and the redemption of that money payment, if the heritor or heritors concerned so desire, in such manner as may be agreed upon between the General Trustees and such heritor or heritors, or as, failing agreement, may be fixed by the Commissioners; and (g) the protection of the interests of the ministers or assistants and successors who at the passing of this Act were incumbents of the benefice of any parish.<sup>3</sup>

**826.** The Church of Scotland General Trustees are now proprietors of each glebe as soon as the transfer thereof to them has been completed, and application to the Court is no longer necessary before a glebe is sold or feued.

## PART II.—VOLUNTARY CHURCHES OF SCOTLAND.

### SECTION 1.—DEFINITION.

**827.** Under this title are grouped, for convenience, all ecclesiastical bodies other than the Established Church of Scotland and the Episcopal Church in Scotland. The definition is not quite accurate. The Episcopal Church in Scotland (which it excludes), though long the subject of special legislation, is now a Voluntary Church in the eye of the law. So, again, is the Roman Catholic Church. But this body, though now in the view of law the most ancient of Voluntary Churches in Scotland, has never acquiesced in that description. It claimed jurisdiction over all Scotsmen, certainly over all baptised Scotsmen, whether they were "willing" to be under it or not, and it exacted tithes from them as from its own members. Such claims can of course only be enforced by the alliance and assistance of the State. But the Church of Rome has always asserted that alliance, and the modern Syllabus of 1864, s. 55, has apparently made it a point of faith. It is, therefore, only after explanations that it can be grouped with Churches which found their authority upon, or derive it through, the consent of their members.<sup>4</sup> And, even

<sup>1</sup> 29 & 30 Vict. c. 71.      <sup>2</sup> 4 & 5 Geo. V. c. 48.      <sup>3</sup> 15 & 16 Geo. V. c. 33, s. 30 (3).

<sup>4</sup> The Protestant theory is that the Church is a voluntary society, but not a mere voluntary society. As Gisbert Voetius puts it in his *Politica Ecclesiastica*, it is founded: 1. Ultimately, on the institution of the Church by God (with jurisdiction from Him). 2. Proximately (each Church is founded), on the voluntary consent of its members (contract or *mutuus consensus*).

so, it will be convenient to deal with the Scottish Church in communion with Rome, in the first place, and separately.

## SECTION 2.—ROMAN CATHOLIC CHURCH.

**828.** The Catholic Church in Scotland was always more closely connected with Rome than were some other European branches, and it shared much less than they in the development of Nationalism during the two centuries before the Reformation. Yet it held Provincial Councils, and was sometimes called the Scottish Church. It is doubtful whether "Haly Kirk," in whose favour so many Statutes were passed by successive Stuart Kings, meant the national, or the European institute; though it was, of course, only within the bounds of Scotland that these Acts took effect. But we are not to look to any one Statute for the compulsory establishment of a Church in Scotland. That was part of the general law of Catholic Europe from A.D. 381, when Theodosius, with the sanction of St. Ambrose, finally overturned the toleration of Constantine. For many centuries in Scotland the penalty for refusing to be a member of the Church had been death, and shortly before the Reformation the same penalty was enacted for arguing against the Pope's authority.

**829.** In 1560 all this was reversed. The Parliament of that year<sup>1</sup> adopted a Confession with the clause, that "to Kings, princes, rulers, and magistrates, we affirm that, chiefly and most principally, the conservation and purgation of the religion appertains," including the suppressing of both "idolatry and superstition." And accordingly, a week later, it not only annulled previous Catholic legislation and penalties, but abolished the Pope's jurisdiction in Scotland, even over his own co-religionists, and made celebrating the Mass punishable on the third lapse with death. The extreme penalty was scarcely ever exacted; but other persecuting Acts followed, and Catholics were henceforth exposed to endless annoyances and restrictions; their religion (and that of all other Dissenters) being illegal under the general principle laid down in the Act 1579, c. 69. That Act not only "declares and grants jurisdiction to the Kirk," but also "declares that there is no other face of Kirk, nor other face of religion, than is presently, by the favour of God, established within this realm, and that there be no other jurisdiction ecclesiastical acknowledged within this realm." This intolerance put an end for three centuries to the regular succession of Scottish bishops; but Catholics were enabled to cling to papal jurisdiction, even more directly than before, by the administration of Prefects and Vicars-Apostolic.

**830.** The relief from their civil disabilities, postponed by the attempts of James VII. and II. and his family down to 1745, began in the eighteenth century. The last relics of such disabilities were removed by the Roman

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<sup>1</sup> Act 1560, c. 1.

Catholic Relief Act, 1926.<sup>1</sup> These last remaining disabilities thus removed concerned mainly the right of erecting steeples with bells on Catholic churches, the right to wear ecclesiastical vestments in public places, the endowment of monastic or scholastic institutions, and the admission of Jesuits and other religious Orders in this country.

831. In 1878 the Hierarchy was at last restored by the Pope, whose power, however, over the modern Scottish church and its bishops is (since the Vatican Decrees) greatly more despotic than that of Paul IV. was in 1560. Indeed, the Letters Apostolic of 1878 expressly take away the "particular privileges and customs" of the ancient Scottish branch, and bring it under the "common and general discipline of the Catholic Church." The Statutes abolishing Catholic jurisdiction have never been repealed, but no one doubts that this Church is carried on in Scotland by submission to a jurisdiction more or less parallel to what is found in the Presbyterian and Episcopal bodies, and more ancient. Catholic jurisdiction, indeed, in its full development, added some startling incidents—such as the claim that certain crimes by ecclesiastics should not be tried by the secular power, and the claim of the Pope to be *arbiter gentium*—incidents which would be absolutely rejected by our law even if it admitted an ecclesiastical jurisdiction founded on contract *inter se* of Scottish Catholics. But hitherto questions of this communion have very rarely come before our Courts. For many generations the attempt to raise them there would have been both futile and dangerous; and the habit thus formed has persisted. On the religious side, too, the appeal to Rome is now far more controlling than it was in the days of Hildebrand or Cardinal Beaton. And on the secular side, the Scottish property of the Church, understood to have been transmitted through centuries from one trustee to another, at a time when it was unsafe to put upon record any expression of the trust, seems to be now so far regularised in tenure that at least no question is raised when it might be possible to raise it.

### SECTION 3.—PRESBYTERIAN CHURCHES.

832. The twofold intolerance of the Pre-Reformation and Post-Reformation Statutes furnishes the starting-point for the long history of the dealing of the law of Scotland with the Presbyterian Churches. Up to the eighteenth century that law had never been invoked to deal with men outside the Establishment, except (as in the case of the Quakers) in the way of cruel punishment. By that time, however, a special Statute had been passed tolerating the Episcopalians;<sup>2</sup> and not only Reformed Presbyterians (Cameronians) who had remained outside the Revolution Settlement of 1690, but the first Secession which had left it in 1733, presented the aspect of numerous congregations grouped under an independent Presbyterian government. But the first decision of the

<sup>1</sup> 16 & 17 Geo. V. c. 55.

<sup>2</sup> 10 Anne, c. 7.



Court, so late as the middle of the eighteenth century, was that not even the congregations could be legally recognised. In the case of *Bristo*, and Adam Gib, their minister,<sup>1</sup> trustees elected by the congregation sued upon a back-bond, and the defence was that such a congregation could not authorise a suit. "The Lords found that the pursuers had no legal title to pursue, their constituents being no legal congregation." And in the same year "the like was found" in the case of "the Associate Congregation of Eaglesham."<sup>2</sup>

**833.** It was twenty years before the principle of these decisions was reversed, in the case of *Wilson*,<sup>3</sup> and then only after the Court had struck out the designation of the pursuers as suing "in the name of the Associate Congregation of Dundee, *subject to the Associate Synod*" (as they erased, so late as 1809,<sup>4</sup> the designation of "Bishop of the Episcopal Communion in Scotland"). The title to sue was sustained in a quite similar case in 1791;<sup>5</sup> and in the same year a much more important step was taken in the case of *Auchincloss v. Black*.<sup>6</sup> In this case a minister brought an action of damages against the members of the "Associate (Burgher)" Presbytery, which had deposed him for immorality, but, as he alleged, maliciously and by conspiracy. The Lord Justice-Clerk (Braxfield), who was the Ordinary, held it incompetent "to review the proceedings of associate congregations, commonly called Burghers, when sentences are pronounced by them in their ecclesiastical character," and the Court dismissed the action on the ground that it required to be based on malice, which had been alleged, but not relevantly. In a later case of damages in 1808, *Grieve v. Smith*,<sup>7</sup> "the Lords thought that everything must be laid aside which had passed, judicially in some measure, at the meetings of the congregation, and according to the rules and usages of the Berean Society"; and Lord Braxfield's judgment on the competency was long after repeated by Lord Moncreiff, Ordinary, in the unreported case of *Osborne*.<sup>8</sup>

**834.** Meantime the existing law on the subject was elaborately discussed in the Aberdeen case.<sup>9</sup> This case turned, more obviously than some which had preceded, on the disputes and divisions of the Secession; and the Court, now holding unanimously that the spirit of the law gives the Secession "toleration and protection," admitted the necessity of finding some principle of doing justice as between its members. The question was between the majority of a congregation, claiming their meeting-house against the minister and a minority, whose counter-claim to it was sanctioned by the Synod. The judgment retains somewhat of the old intolerance in the view that the minister "cannot be

<sup>1</sup> Reported *sub nom.* *Bryson v. Wilson*, 30th June 1752, Elchies notes *voce*, "Title to Pursue."

<sup>2</sup> *Pollock v. Maxwell*, 8th July 1752, Elchies notes, *ibid.*

<sup>3</sup> *Wilson v. Jobson*, 1771, Mor. 14555.

<sup>4</sup> *Drummond v. Farquhar*, 6th July 1809, F.C.

<sup>5</sup> *Allan v. Macrae* (Berean Society), 1791, Mor. 14583.

<sup>6</sup> Hume's Decisions, 595.

<sup>7</sup> Hume, 637.

<sup>8</sup> 5th July 1831.

<sup>9</sup> *Dunn v. Brunton*, 1801, Mor. *voce* "Society," App. i. 10.



allowed to represent his office as flowing in any shape, or deriving permanency, from the proceedings of what may be called a Synod or other ecclesiastical court of his sect"; but the general ground on which it was based was that "the Court can enter into no investigation as to the religious grounds of the schism here, and if they did, they must presume the majority in the right." The tone of it, however, resembles that of the Roman who said so summarily to the Jews, "If it be a question of words and names and of your law, I will be no judge of such matters"; and both sides of the twofold ground of decision were overthrown in the very next case.

**835.** This was the great litigation of *Davidson* or *Craigdallie v. Aikman*,<sup>1</sup> an extraordinary case, were it only as having been selected to try the general point "more deliberately," and accordingly lasting more than twenty years (1800–1820). The rubric again broadly raises the question of Church toleration, "*Is it lawful to bestow property on a seceding congregation, subject to the discipline of a self-constituted, but tolerated, ecclesiastical body?*" And the argument that, according to its modern principles, the law must tolerate and recognise not only particular congregations, but also "a voluntary association of a great body of men, possessing unity of sentiment in doctrine and discipline, and subjecting themselves to the control of certain ecclesiastical bodies, whose authority they acknowledge in all spiritual matters," was ultimately successful in the Court of Session, was not questioned when the case went to the House of Lords, and may be said to have been in this case finally settled. What divided the Court for so many years was the application of this general toleration to the question of Church property, on this occasion a chapel in Perth. By its first judgment the Court of Session declined to look at the superior judicatories in this matter of property, and gave the chapel to the majority (not the numerical, as before, but the pecuniary majority) of the congregation. But by its second judgment it went the other way, and found that the chapel must be held for persons who had contributed their money, such persons "always forming a congregation of Christians continuing in communion with and subject to the ecclesiastical discipline of a body" including this and other congregations. Both judgments wholly declined to go into the questions of doctrine or discipline which had divided the litigants; and this was the ground on which both were unexpectedly and completely overturned in the House of Lords. Lord Chancellor Eldon, on 14th June 1813, pointed out that the moneys must have been contributed by men having certain common religious principles or persuasions, and proposing to adhere to them; and that consequently the real question was not which party was the majority, or which party was approved by the superior Synod, but which party retained those original principles and persuasions. This judgment has fixed the law

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<sup>1</sup> 1805, Mor. 14584, and 27th June 1805, F.C.; and in H. of L. 1813, 1 Dow, 1; 1820, 2 Bligh, 529; 6 Pat. 618.

ever since; but in the only case which occurred after it during a long series of years, that of *Campbelltown*, 1839,<sup>1</sup> the Court held that no case was proved against the "Relief Church" of deviation from essential or fundamental principles, though its persuasions (on Church and State) had largely changed. In this case one judge, Lord Meadowbank, elaborately construed Lord Eldon's judgment as leaving room for proving an "original principle" of a Presbyterian Church by which it may reserve to itself the power of reforming its own persuasions and regulations, and to its regulative body the power of authoritatively determining that they ought to be and shall be changed. Such authority in Lord Meadowbank's view (which has not yet been followed), would in law bind the members of the body; and it should even be held as *probatio probata* by the civil Courts (a view which has since been emphatically denied).

#### SECTION 4.—"DISRUPTION" CASES.

**836.** But this leisurely development was broken by a sudden crisis on another side, and by the great series of decisions—the most important, perhaps, of the Courts of Scotland since their origin—in which they dealt with the pretensions of the Church of Scotland itself before 1843. With these decisions and definitions, cumulative and solemn as they were,<sup>2</sup> we are not here concerned, except in so far as the Court held the Church's claims admissible only on the condition of its becoming a Voluntary body. In the *Lethendy* case, the Lord President, addressing a Presbytery which had obeyed the Assembly against the Court, said: "In the view that you are a branch—and a most numerous and most respectable one—of the universal Church of Christ, you are on the same footing—but on no better footing—with all the other bodies adhering to the Presbyterian form of Church government throughout the country. Taking you in your character as merely members of the Church of Christ, the Synod of Burghers and the Synod of Anti-Burghers, or any other Synod, have the same powers and privileges as you have; and you have no greater powers than they have." And again, in the more solemn decision of the *Second Auchterarder* case: "If these gentlemen wish to maintain the situation of what they call a Christian Church, they would be no better off than the Catholic Church or the Episcopal Church, or the Burghers or Anti-Burghers; but when they come to call themselves the Established Church, the Church of Scotland—what makes the Church of Scotland but the law?" Or, as Lord Campbell summed it up when

<sup>1</sup> *Smith v. Galbraith*, 1839, 14 Fac. 979; and 1843, 5 D. 665.

<sup>2</sup> Robertson's *Auchterarder* case (*Earl of Kinnoull v. The Presbytery of Auchterarder*), 2 vols. 1838, with H. L. Supplement, 1839; Robertson's *Lethendy* case (*Clark v. Stirling*), 1839 and 1 D. 955; *Strathbogie* cases (*Edwards v. Cruickshank*), 1840, 2 D. 585; 3 D. 282; *Second Auchterarder* case (*Earl of Kinnoull v. Fergusson*), 1841, 3 D. 778, and 1842, 1 Bell's App. 662; *Culsalmund* case (*Middleton v. Anderson*), 1842, 4 D. 957; *Stewarton* case (*Cunninghame v. The Presbytery of Irvine*), separate volume, 1843; *Strathbogie Reduction* case (*Cruickshank v. Gordon*), 1843, 5 D. 909; and *Third Auchterarder* case (*Earl of Kinnoull v. Fergusson*), 1843, 5 D. 1010—this last being the only case of the series not very fully reported, while in it even the opinions of the consulted judges are found only in the Session Papers.

the same case was appealed to the House of Lords: "It is only a Voluntary body, such as the Relief or Burgher Church in Scotland, self-founded and self-supported, that can say they will be entirely governed by their own rules."

**837.** The self-government thus claimed and disallowed was two-fold: (1) As to Legislation, both a positive and a negative restriction were declared. On the one hand, the inability of the Church to legislate in any important or constitutional matter was ascertained in regard to what were supposed to be the two chief duties of the time, Church expansion and Church union. The Church having by its own authority admitted to its Presbyteries not only the pastors of the two hundred new congregations which it had raised, but also the Original Secession and other ministers who had returned to the Establishment, both acts were disallowed. And, on the other hand, the absolute obligation of civil Statute, even in matters "strictly ecclesiastical," was declared in the case of Queen Anne's Patronage Act, whose enforcement the Assembly had represented as violating the "fundamental law" of the Church itself—a plea which in the House of Lords the Lord Chancellor held to be, even if true, "perfectly immaterial," while the five judges who concurred in the leading opinion in the closing case put it that civil Statute "leaves the Church Courts no longer independent and free to act like a voluntary association." (2) As to Jurisdiction, the recognition of Parliament as the Church Legislature, though the most important as well as the earliest finding in this great body of law, fell into the background during the prolonged attempt of the Church to defend itself, on the ground of its jurisdiction, against the enforcement of the law so declared. The ordinary findings of the Church Courts in Scotland have always been final and beyond review; and the General Assembly, passing a resolution that this admitted jurisdiction was an "independent jurisdiction," recognised but not granted by the State, urged that, in the meantime, while they negotiated with Parliament, their sentences should not be reversed. The deliberate refusal of the Courts was based in case after case on the ground stated by the Lord President: "The Church Courts say that they have an independent jurisdiction; but who gave them any jurisdiction? The law, and that alone, gave it; and the law defines what it has so given." The definitions already enunciated were accordingly enforced by interdicts and reductions of some Church acts, by decrees upon the Church Courts ordering them to perform others, and finally by findings forbidding Church majorities to vote, and authorising the minorities to do the required Church acts in their place.

**838.** This, of course, brought a crisis; and in accordance with the view already indicated in the House of Lords, the Queen's Letter proclaimed that though individuals may renounce the Establishment for themselves, "the union of the Church of Scotland with the State is indissoluble, while the Statutes remain unrepealed." The large majorities which had pledged recent General Assemblies to independence, even in view of the loss of establishment, were diminished as the crisis



drew near, but a considerable proportion of the Assembly cited to meet on 18th May 1843 left the place of meeting with a protest; and, holding that they now represented the original Kirk not less but more than formerly, took the name of the Free Church of Scotland. In their Protest, however, they frankly acknowledged that the State was entitled to fix for the future its own conditions of establishment, and that it had now deliberately done so. As to its own future, the Free Church early arranged that its officials should be taken bound, not to all its pleadings or claims, but to its general principle of Church freedom, and made provision also in a model Trust Deed for future amalgamation with other bodies and possible change of name. And while in its "Catechism" it protested its right to revise its Confession, it contented itself in the meantime with abjuring the old principles of persecution, and making a slight change in its "formula." From the past of Scottish history, however, the new body welcomed into its constitution all the aspirations after freedom which the Kirk had recorded in past centuries, rejecting, of course, at the same time, the restrictions to which it had often unwillingly submitted. In this it had the full sympathy of the Presbyterian Voluntaries outside, who had all from their origin cherished Church independence to at least the same extent, and had indeed in many cases seceded mainly from a desire to realise it. Their divisions and subdivisions, which had perplexed the Courts early in the century, had now been succeeded by an era of reconciliation and union; and on 13th May 1847 the two largest bodies became one under the name of the United Presbyterian Church. In bulk as well as in their historical relations the Presbyterians outside Establishment now challenged the attention of the law, which had been previously too acutely absorbed by the crisis within.

#### SECTION 5.—JURISDICTION OF CHURCH COURTS.

839. The first body outside, however, which was dealt with was the Episcopal Church, in the case of *Dunbar v. Skinner*,<sup>1</sup> where it was held not only that a bishop of that Church has no jurisdiction even over its members (inasmuch as all jurisdiction flows only from the Crown), but that the office of "Bishop of the Protestant Episcopal Church in Scotland" could not be recognised. It may be true that *prorogated* jurisdiction was not disputed in this case to be possible, but its existence has not been formally acknowledged by the Court in this or any other case; and the anxious avoidance in so many ecclesiastical cases of an ecclesiastical word so familiar as jurisdiction has more or less delayed the progress of the law in this region. This came out especially in the *Cardross* case, 1859–1862,<sup>2</sup> where a minister was deposed on the spot by the Free Church Assembly for having asked the civil Court for an interdict (which was refused) against their previous sentence upon him

<sup>1</sup> 1849, 11 D. 945.    <sup>2</sup> *M'Millan v. Free Church*, 1859–1862, 22 D. 290; 23 D. 1314; 24 D. 1282.



for misconduct. He brought an action of reduction of both sentences and for damages: the substantial allegation being that the Assembly had in the first instance judged upon evidence not regularly brought before it. The Assembly pleaded against the reduction that "spiritual acts done in the ordinary course of discipline by a Christian Church, tolerated and protected by law," cannot be reviewed—a ground nearly identical with that since laid down by the Supreme Court of the United States<sup>1</sup> as the law of that commonwealth. This plea was at once repelled, in accordance with the cases of 1843 and that of 1849; but other pleas that the pursuer had in his contract with his Church "submitted to its authority in spiritual matters as final" were reserved, and the order to "satisfy production" was made easy to the Free Church by explanations from the Bench that the Court would not "repose" their minister, but at the most give damages. This view, that damages are the proper remedy in cases of ecclesiastical wrong, was emphasised by the collapse of the *Cardross* case, which the Court, very much *proprio motu*, threw out altogether in its fourth year on the ground that the claim of damages included in it was inept, being directed against the unincorporated General Assembly of the Free Church. Lord Deas dissented, on the ground that in the case of an ecclesiastical wrong a mere reduction is competent; but this view has been finally rejected in the case of *Skerret v. Oliver*.<sup>2</sup> It was again laid down there that reduction of the resolutions of churches and such voluntary associations (in this case the United Presbyterian Church) is a competent form of process, but only "on the way" and "in so far as it may be necessary" to a specified remedy for alleged invasion of patrimonial rights. And Mr. Skerret having merely reserved his claim to damages, and not preferred it in the same action, his reduction was thrown out like the other. (In both these cases, interdict against the Church sentences had been promptly refused.) The chief difference between the two Churches as defenders seemed to be that the United Presbyterian Church took its officials bound, not merely, like the Free Church, to hold its Church sentences as final, but to bring no action even for the civil claims which those sentences bar. In both cases, however, no proof was led, and the pursuer was thrown out, not on his submission to the Church judgment, but on the prior question of the unfortunate form of action.

840. The result is, that even with regard to future actions claiming the proper remedy of damages, numerous important points have not been formally decided (though some have been raised, as by Lord Kincairney (Ordinary) in the *Skerret* case, and by individual judges in the Inner House). One is, whether submission to the Church arbitration as final does not altogether bar such actions. Another is, whether at least it does not bar a claim of damages except upon the averment of "malice."<sup>3</sup> A third is, whether the submission of the parties to the

<sup>1</sup> *Watson v. Jones*, 1871, 13 Wallace's Sup. Court Rep. 679.

<sup>2</sup> 1896, 23 R. 468.

<sup>3</sup> *Sturrock v. Greig*, 1849, 11 D. 1220; *Edwards v. Beggie*, 1850, 12 D. 1134; *M'Millan v. Free Church*, 1862, 24 D. 1282; *Lang v. Presbytery of Irvine*, 1864, 2 M. 823.

authority (and, in their own view, the jurisdiction) of Churches and their Courts does not ordinarily imply (1) the right of such Courts not only to decide on the merits, but also to regulate matters of form and method in arriving at the decision; and (2) the right of such Churches to modify their own doctrine as well as discipline and worship by legislation from time to time. And a fourth may be whether, even if the former points are conceded, it is necessary to go as far in recognising the contract as the Privy Council in 1863,<sup>6</sup> where it was held (as in the American leading case of *Watson* already quoted) that "where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice."<sup>1</sup>

#### SECTION 6.—CHURCH PROPERTY CASES.

**841.** Some of these questions came up in cases as to disposal of Church property in the event of separation or union, which also were brought into Court during the period after 1843. The two leading cases were Presbyterian. In the *Kirkintilloch* case in 1850<sup>2</sup> the Lord Justice-Clerk (Hope) elaborately reviewed all the early cases with a view to overthrowing the construction put by Lord Meadowbank in 1839 on the leading judgment of Lord Eldon in 1813. The chief principle of that ruling by the House of Lords, it was pointed out, was that in the ordinary case of property held in trust for a congregation, the property belongs to the congregation, and that when it divides, the question is, what were its original principles? In such a question it is not necessary to take into account the views, or the changed views, of the body of which the congregation is part; least of all is the decision of the congregational dispute by that body itself to be taken as *probatio probata* of those principles. And in a case like this (which was the union of the Secession and Relief into the United Presbyterian Church) the congregation is not bound in law to follow the body with which it is connected into union with another. In this *Kirkintilloch* case, the decision protected the majority of a congregation which declined to go into a union, and claimed to retain its congregational property; but its weight has been greatly increased by the unanimous judgment of the Second Division in 1859, that even the minority of a congregation, adhering to its original principles, is in like manner entitled to refuse to follow the body with which it has been connected, and to retain the property against the congregational majority. This was the *Thurso* case,<sup>3</sup> in which the minority of an

<sup>1</sup> *Long v. Bishop of Cape Town*, 1863, 1 Moore's P.C. (N.S.) 411 at p. 461.

<sup>2</sup> *Craigie v. Marshall*, 1850, 12 D. 523.

<sup>3</sup> *Couper v. Burn*, 1859, 22 D. 120.

Original Secession congregation claimed its church buildings against the majority both of the congregation and of the body, which as a whole was joining the Free Church. The authority of these two judgments was impaired, in the estimate of Presbyterians, by the additional and perhaps unnecessary opinion, put more emphatically in the former of the two, that in cases of Church union the congregation (or its minority) is entitled to refuse and to claim the property, without proving, or even alleging, that union would involve any change of their original principles. "For separation, when such union is to be entered into, no reasons, in my opinion, need be assigned." The congregation is "not bound even to inquire" into the principles of the Church body outside it, or of the proposed union: "the right to refuse is absolute."

842. The tendency of these findings to bar all reconstruction in Scotland, serious as it was, was not so important to the law as their ignoring of the Presbyterian principle obliging members to unity. For while both judgments went on to shew that in point of fact there were differences of principle, or at least differences of previously held tenets or "testimonies," between the bodies proposing to unite, the question was naturally not raised, as it had been in the *Campbelltown* case, how far these testimonies were essential and unchangeable, and how far the fundamental principles of the Church (and of the congregation when originally joining it) bound it to sacrifice doubtful tenets for the sake of truth, and superfluous tenets for the sake of unity. Strictly, indeed, the *Kirkintilloch* and *Thurso* cases relate only to property held in trust exclusively for a congregation, and most of the congregations of the Churches concerned had already, or have now, adopted other "Model Deeds" providing more equitably for cases of separation and union. Effect was given by the Court to the terms of such a trust deed in the case of *Kennedy v. Morrison and Lee*.<sup>1</sup> But even with regard to congregational property, the Lord Justice-Clerk's powerful opinion in the *Kirkintilloch* case probably gives the general Presbyterian "body" too little right and interest, as that of Lord Meadowbank in the *Campbelltown* case gave it too much.

843. These two last Presbyterian cases were followed by an Episcopalian one in 1867,<sup>2</sup> which makes reference to some of the questions latterly ignored. The ground on which the House of Lords decided against Bishop Forbes was that "the civil Courts cannot entertain questions between the members of non-established churches and other voluntary associations, regarding alleged violations of the constitutions or rules thereof," in this case by erecting a new Code of Canons, "except in so far as is necessary for determining questions of civil right," which was held to mean present patrimonial interest. But the House of Lords judges also pointed out that every such Church must have something in the nature of a legislature, with a power to make changes on canons and constitutions which the Court will respect, reserving, however, the

<sup>1</sup> 1879, 6 R. 879.    <sup>2</sup> *Forbes v. Eden*, 1865, 4 M. 143; and 1867 (H.L.), 5 M. 36.



question whether there are "civil rights already acquired under existing canons or rules."

#### SECTION 7.—CONGREGATIONALIST CASES.

844. There have been few cases in the Courts of Scotland dealing with "Congregationalist" societies or with isolated congregations. In *Connell v. Ferguson*<sup>1</sup> the members of such a body having contributed funds to erect a church, and afterwards having divided and separated, the minority claimed that their subscriptions should be returned. It was held that the majority was entitled to apply the whole fund to the building of the church. In *Thomson v. Anderson*<sup>2</sup> it was held that there was no failure of trust objects such as to warrant diverting congregational funds; and in *Burnett v. St Andrew's Episcopal Church*,<sup>3</sup> that property left to an ancient Episcopal congregation did not pass with most of its members when they joined a Relief (Presbyterian) Church, but should be given to a modern Episcopal Church which had arisen in the same town. Two "Ferguson Bequest" cases were peculiar, in respect that Mr. Ferguson, at his death in 1856, gave his trustees large discretion in selecting from five religious denominations needy congregations and schools to be subsidised from year to year. In the later case, *Ferguson Bequest Fund*,<sup>4</sup> it was held by the First Division that in using as the name of one of these denominations, "The Congregational or Independent Church in Scotland," the testator must be supposed to have intended the group of (autonomous or independent) congregations usually known collectively by that name at the date of the will, to the exclusion of a group then known as "The Evangelical Union," though this latter body was proved to have been also congregational or independent in its constitution. Accordingly, though the latter body in the year 1892 joined the loose federal "union" of the former group, and so became nominally as well as in fact congregational, it was found to have thereby gained no rights to the Ferguson funds; and those who had broken off from the same congregational group or "union" because they resented the reception into it in 1892 of the Evangelical Union, were found not to have thereby lost their previous interest in the same trust funds. The previous *Ferguson Bequest* case<sup>5</sup> resulted similarly, though it was found impossible to settle it on the same obvious ground. Here the Reformed Presbyterian Church, after enjoying its share of the funds for many years, joined the Free Church by a large majority. A minority remained outside; and each party, maintaining that its action was what the principles of their Church called for, claimed the whole of the Church's share. It was held that both should continue to receive it proportionally. In this case, too, a curious preliminary point was settled. It was held that the "contract" of the minority, which, in addition to claims to jurisdiction common to them with other Presby-

<sup>1</sup> 1861, 23 D. 683.

<sup>2</sup> 1887, 14 R. 1026.

<sup>3</sup> 1888, 15 R. 723.

<sup>4</sup> 1899, 1 F. 1224.

<sup>5</sup> 1879, 6 R. 486.



terians, provided that no member should take the oath of allegiance to a successor of the Stuart Kings on the British throne, was not *pactum illicitum* so as to disentitle it to sue.

#### SECTION 8.—FREE CHURCH UNION CASE, 1904.

**845.** The law relating to church property was fully discussed in the case of *Free Church of Scotland v. Lord Overtoun*,<sup>1</sup> in which, after a second hearing, the House of Lords remained divided in opinion. That case, however, added but little to the development of the law. The pursuers, who were the minority of the Free Church who refused to join, along with the majority of their fellow-members, in a union with the United Presbyterian Church, alleged that the majority had by that union abandoned fundamental principles of the Free Church, and had thereby ceased to be beneficiaries of the trusts under which the property was held. The question at issue was whether the "identity" of the Free Church had been preserved or lost in the United Free Church which it combined with the United Presbyterian Church to form. The principal ground of attack on the validity of the union was that, whereas it was a fundamental principle of the Free Church that the State is under obligation to maintain and support an "establishment" of religion, the United Free Church did not maintain that principle. It was held by a majority of the judges in the House of Lords (1) that the "establishment" principle was a fundamental principle of the Free Church; (2) that in the union the majority of that Church had abandoned the principle; and (3) that the constitution of the Free Church did not confer any power on any legislature of the Church to make such a change. The property held in trust for the Free Church thus fell to the dissident minority, who alone maintained the "identity" of that Church.

**846.** It was clearly recognised by several of the judges that the constitution of a voluntary church might contain within itself a power of amendment which would enable the church to modify its doctrine or principles without loss of its "identity"; but that such a power, like any other part of the church's doctrine or principles, required to be proved. "The bond of union [of a voluntary church] may contain within itself a power in some recognised body to control, alter, or modify the tenets and principles at one time professed by the association: but the existence of such a power would have to be proved like any other tenet or principle of the association."<sup>2</sup> The contention that a church, as such, has, or must be presumed to have, a power vested in its supreme governing body of modifying its creed or basis of union was negatived by the majority of the House of Lords.<sup>3</sup> In order to avail itself of this principle, the United Free Church in 1906 declared through its General Assembly (Act I., 1906), in an "Act anent the Spiritual Independence of

<sup>1</sup> 1904, 7 F. (H.L.) 1; in Court of Session, *sub nom.* *Bannatyne v. United Free Church of Scotland*, 1902, 4 F. 1083.

<sup>2</sup> *Per* Lord Davey at p. 26.

<sup>3</sup> *Cf.* *Ness v. Miller*, 1912, 2 S.L.T. 263.

the Church," that "this Church has the sole and exclusive right and power from time to time, as duty may require, through her courts to alter, change, add to, or modify her constitution and laws, subordinate standards, and formulas, and to determine and declare what these are, and to unite with other Christian Churches. . . ."

847. Provision made in a trust deed for the contingency of a division or union in the church which is the beneficiary will receive effect in accordance with the terms of the deed whenever the contingency arises.<sup>1</sup>

### PART III.—EPISCOPAL CHURCH IN SCOTLAND.

#### SECTION I.—HISTORY OF DIFFERENT CLASSES OF EPISCOPAL CHURCHES IN SCOTLAND.

848. The Protestant Episcopal form of Church government existed in Scotland between 1572 and 1592, when the Presbyterian, introduced at the Reformation between 1560 and 1567, was re-established by the Act 1592, c. 116; in 1606 Episcopacy was restored by the Act 1606, c. 2; but Presbytery again prevailed in 1638, when the General Assembly of Glasgow deposed the bishops. At the Restoration, Episcopacy was re-established by 1662, c. 1; and finally, at the Revolution Settlement in 1689, Presbytery was declared to be, and still continues, the Established or State Church of Scotland, 1689, c. 3, and 1690, c. 5. The Presbyterian Establishment retains the portion unappropriated by the Crown and owners of land of the estates, tithes, and revenues formerly held by the Roman Catholic Church, whose exorbitant wealth was a subsidiary cause of the Reformation. It is the only Church recognised by the Constitution or officially by the Crown and its representatives.

849. The Episcopal Church, however, continued, and till lately existed, in two forms, one of which is the lineal descendant of the Episcopal Church established for certain intervals under the Stuart Kings, while the other consisted of a few individual churches authorised by the Toleration Act<sup>2</sup> for the use of congregations at first consisting chiefly of English residents or visitors in Scotland. These have now ceased to exist. The last survivor of them was St Peter's, Montrose, which, in 1925, united with the Scottish Episcopal Church by amalgamating with the congregation of St Mary's, Montrose, to form one church under the name of St Mary and St Peter. At one time there were several others, as St Paul's, Aberdeen, and St James's, Aberdeen (an offshoot from St Paul's), and St John's, Perth, which have all now become united with the Scottish Episcopal Church. These churches did not acknowledge the bishops of the Scottish Episcopal Church, and received the services of bishops of the Church of England. A third class of Episcopal churches originated from recent secessions of a few individual ministers, usually carrying their congregations, or most of them, with them from

<sup>1</sup> *Lyon's Trs.* v. *Aitken*, 1904, 6 F. 608.

<sup>2</sup> 10 Anne, c. 7.

the Scottish Episcopal Church, of which St Thomas's, Edinburgh, formed by the Rev. T. K. Drummond in 1842; St Vincent's, Edinburgh; St Jude's and St Silas's, Glasgow, were the chief. This class called themselves English Episcopal, and an attempt, only partially successful, was made to unite them with the older English churches in Scotland in order to procure for them the confirmation and services of an English bishop.

**850.** When the Scottish Episcopal Church was gradually relieved of its disabilities and recognised as in full communion with the Church of England, as will be presently noticed, the position of the third class of Episcopal churches ceased to be tenable. The Convocations of the Provinces both of York and Canterbury passed, in 1877, resolutions condemnatory of a Colonial Bishop, Bishop Beccles, who had come to Scotland to confirm members of seceding Episcopal congregations. In 1878 the Lambeth Conference of Bishops of the Anglican Communion recognised the Scottish Episcopal Church as in full communion with the Church of England and the other churches represented at the Conference.

**851.** A considerable number of the members of the first class, or proper Episcopal Church of Scotland, espoused, or at least sympathised with, the Jacobite cause until the failure of the '45 rising, and many of them, having refused to take the oaths of abjuration and allegiance (from which they were called Non-Jurors), or to pray for the Sovereigns of the House of Hanover, were proscribed by a series of Acts during the eighteenth century. These Acts, and those passed in the nineteenth century repealing the penalties and disabilities by which the proscription of the Scottish Episcopal Church was enforced, represent the legal history of that Church and the attitude of the State towards it. The constitution of the Episcopal Church in Scotland, like that of all churches not established by law within the State where they exist, is contained in the contract or agreement of its members, which, as to the whole Church, is determined chiefly by the Code of Canons, and, as to individual churches by that Code and the documents containing their separate constitutions, framed in conformity with the provisions of the Canons.

## SECTION 2.—LEGISLATION RELATIVE TO EPISCOPAL CHURCHES AND CLERGY.

**852.** The constitution of the Episcopal Church being thus self-originated and contractual, questions as to the limits within which, and the conditions under which, the whole Church and its individual congregations may, like other quasi-corporate bodies, act in matters affecting the civil rights of its own members or of outside parties, are regulated by the law of the land, and it is still necessary to refer to the statutes to shew its exact legal position.

**853.** In 1695<sup>1</sup> "all outed ministers," by which term was meant

<sup>1</sup> 10 & 11 Will. III. c. 12.



those who not having accepted the Presbyterian Establishment had lost their cures, were prohibited from baptizing children or solemnising marriages, under pain of imprisonment until they found caution to go out of the kingdom and never to return. There was no prohibition against other services, and many Episcopal clergymen continued to minister in private houses, secret meeting-places, and in some few instances in churches such as Kilmonivaig and Blair Athole, not used by the Established Church. In a few instances the two churches, as at Glenprosen in Angus, shared for a time the use of the church. Many of the clergy, however, neither took the oath to the Sovereign nor prayed for the Royal family. In 1711<sup>1</sup> the Statute of 1695 was repealed, and it was declared lawful for those of the Episcopal communion in Scotland to attend divine worship after their own manner. But no one was to officiate in this worship who was not ordained by a Protestant bishop, or who did not take the oaths of allegiance to Queen Anne and of abjuration of the Pretender. Their meetings for divine worship were to be held with open doors, and all ministers were at some time in divine service to pray for Queen Anne, the Electress Sophia of Hanover, and the Royal Family.

854. The favour shewn by many of the Episcopalian clergy and laity for the Jacobite rising in 1715 led, in 1718, to an Act,<sup>2</sup> which required all ministers of Episcopal congregations to take the oath of allegiance to King George and of abjuration of the Pretender, and every Episcopal congregation to pray in express words for the King and the Royal Family. It was followed, after "The '45," in 1746, by a more stringent Act<sup>3</sup> "to prevent pastors and ministers from officiating in Episcopal meeting-houses in Scotland without duly qualifying according to law; and to punish persons for visiting any meeting-house where such unqualified pastors or ministers shall officiate." The Sheriffs were to inquire and report to Parliament the number of Episcopal meeting-houses. In order to qualify, Episcopal ministers were required to produce to the Sheriff-Clerk certificates of having taken the oaths to the Sovereign, and these certificates, after registration by him, were to be affixed to their meeting-houses. They were also required to pray for the King and Royal Family. Failing such a certificate, the meeting-house was to be closed, and a minister who had not qualified by taking the oaths and praying for the King was liable to six months' imprisonment for a first, and transportation for any subsequent, offence. Laymen who frequented such meeting-houses were also liable to penalties. In 1748 this severe Act was further explained and enforced.<sup>4</sup> By the Act of 1748 no Letters of Orders were in future to be recognised except from bishops of the Church of England or Ireland. Peers who attended unregistered meeting-houses were disqualified from voting at the election of Representative Peers, and other persons who did so were disqualified from voting or being voted for

<sup>1</sup> 10 Anne, c. 7.<sup>2</sup> 5 Geo. I. c. 29.<sup>3</sup> 19 Geo. II. c. 38.<sup>4</sup> 21 Geo. II. c. 34.



at parliamentary elections. Civil and military officers so attending were disqualified from office for a year after conviction.

**855.** Nearly half a century later, in 1792, when the danger of a Jacobite Rebellion had ceased, the first Relief Act<sup>1</sup> was passed, by which—

(1) The penalties, forfeitures, and disabilities imposed for resorting to, or officiating at, an Episcopal meeting-house were repealed.

(2) A modified declaration and the subscription of the Thirty-Nine Articles with regard to which certificates were to be taken out as formerly, were substituted for the old oaths of allegiance or abjuration, but the penalty for non-compliance was limited to £20 for a first offence, and the incapacity of officiating for three years for a second. Some minor disabilities were retained, and ministers not taking the certificate still forfeited the parliamentary franchise. Episcopal ministers were disqualified from holding benefices in England unless ordained by an English bishop, and the disqualification from voting or being voted for in parliamentary elections still affected persons who were present at meeting-houses where the Sovereign was not prayed for.

**856.** In 1840, the disqualification of Scottish Episcopal clergy from holding English benefices was practically, though not entirely, removed by the provision that bishops of England and Ireland might admit them, provided they brought letters commendatory from the bishop in Scotland from whose diocese they came.<sup>2</sup> Further relief was given to the Episcopal clergy, in 1864, by an Act<sup>3</sup> which repealed the ninth section of the Act of 1792,<sup>4</sup> requiring that they should be ordained by an English or Irish bishop in order to hold benefices in England, and thereby recognised the orders conferred by the Scottish bishops, but still required the consent of the bishop of the English diocese into which they came (s. 5). Any person admitted to holy orders by a Scottish bishop, who officiated more than once in three months in an English diocese without consent of its bishop, was liable to forfeit £10 to the Governor of Queen Anne's Bounty (s. 8).

### SECTION 3.—THE DIOCESAN BISHOPS AND PRIMUS AND THEIR SEES.

**857.** There are at present seven dioceses and bishops in the Scottish Episcopal Church. 1. Edinburgh; 2. St Andrews, which includes the old bishoprics of Dunkeld and Dunblane; 3. Aberdeen; 4. Argyll and the Isles; 5. Brechin; 6. Glasgow, which includes Galloway; 7. Moray and Ross. One of the bishops is elected Primus by the diocesan bishops (sometimes called the College of Bishops) in Episcopal Synod. The Primus when present presides at all other meetings of the bishops, with a deliberative as well as casting vote, unless otherwise provided (Canon 3 of 1911, section 3). He is bound to reply to any application for

<sup>1</sup> 32 Geo. III. c. 63.    <sup>2</sup> 3 & 4 Vict. c. 33.    <sup>3</sup> 27 & 28 Vict. c. 94.    <sup>4</sup> 32 Geo. III. c. 63.

advice made by any other bishop, and is designed "Most Reverend," while the other bishops are designed "Right Reverend." The designation of Primus, introduced by the Canons of 1890, was continued by the Canons of 1911, but the Synod declined to give him the title of Metropolitan. He has no Metropolitan jurisdiction similar to that of an archbishop, and no power or prerogative except what is expressly conveyed to him by the Canons. In *Dunbar v. Skinner*,<sup>1</sup> it was said by L. Fullerton: "The jurisdiction of a bishop of the Protestant Episcopal Church in Scotland has no existence," by which his Lordship doubtless meant direct jurisdiction proceeding from the Sovereign, which belongs only to the Courts of Established Churches. Prorogated jurisdiction, arising from agreement or submission of the members of this or any other non-established Church, was not disputed in that case to be possible for a bishop as well as any other ecclesiastical officer or body. The Court in a case in 1809 ordered the designation of Bishop of the Episcopal Communion in Scotland to be deleted from a summons;<sup>2</sup> but it is thought this decision would not now be followed. In a number of applications to the Court in recent years the designations of bishops and other clerical officials of the Scottish Episcopal Church have been inserted, and allowed to remain without judicial comment.

#### SECTION 4.—THE CANONS OF THE CHURCH.

**853.** The present constitution of the Episcopal Church is principally contained in the Code of Canons enacted by a Provincial Synod of the Church on 7th December 1911. There were prior Codes framed in 1743 by an Episcopal Synod at Edinburgh and by General Synods of the Clergy in 1811 at Aberdeen, in 1828 at Laurencekirk, and in 1838, 1863, 1876, and 1890 at Edinburgh. It may be necessary, however, to refer to the Articles and the Prayer-Book of the Church of England and other subsidiary documents referred to in the Canons, and to the practice of the Church, in order to ascertain what is the law of the Church on particular points. There does not appear any good reason for the Lord Chancellor's doubt in the case of *Forbes v. Eden*<sup>3</sup> that the Canons, to which every clergyman on institution to a charge, or receiving a licence as deacon or priest, promises obedience, form a part, and the principal part, of the constitution or fundamental contract of the Church. The Code of 1911 is a revision of the Code of 1890, and was declared by the Provincial Synod to be, as now revised, amended, and enlarged, in future the Canons and Laws of the Episcopal Church in Scotland.

**859.** The Canons of 1890 dealt with the threefold orders of ministry—bishops, priests, and deacons—the mode of their appointment and their duties (i.-xii.); the formation and regulation of pastoral charges or incumbencies and missions, and of appointments to these (xiii.-xxi.); the

<sup>1</sup> 1849, 11 D. 945.

<sup>2</sup> *Drummond v. Farquhar*, 6th July 1809, F.C.

<sup>3</sup> 1867, L.R. 1 Sc. & D. App. 568, at p. 576.

offices of dean and diocesan synod clerk, the lay officials of the diocese and the Church, and the three kinds of Synods—Diocesan, Episcopal, and Provincial—a name substituted for General Synod in the Canons of 1890 (xviii.-xxxii.); the services of the Church (xxxiv.-xliii.); the registers to be kept by the clergy (xliv.); the Representative Church Council (xlv.); the procedure in the case of accusations against bishops, priests, or deacons (xlv.-l.); and the interpretation of the Canons (li.). In the years which followed the Synod of 1890 much attention was paid in the Church to a further and more thorough revision of the Canons. The need for this arose largely from the feeling that in the legislative work of the Church a recognised position should be assigned to the laity. The Consultative Council on Church legislation, which was set up in 1905 as the result of this feeling, and the last revisal of the Canons, which took place in 1911, are both dealt with later.<sup>1</sup>

**860.** The authority and position of such Canons in relation to the law of Scotland and the Civil Courts was considered in the case of *Forbes v. Eden*,<sup>2</sup> brought by the Episcopal incumbent of the church at Burntisland, to reduce the Canons of 1863, as *ultra vires* of the General Synod held in that year, "except in so far as might be in conformity with the constitution and practice of the Church at the period of his ordination." No pecuniary damage, except in a subsidiary conclusion of the summons afterwards referred to, was alleged, and no injury to the pursuer's status as clergyman of the church at Burntisland was averred. The case was decided upon the ground that unless there is such averment the Court will not inquire into the acts of a voluntary religious association acting by the proper Church Court or official. The Lord Chancellor and Lord Cranworth also entered into the particular grounds of objection by Mr Forbes to the alterations made by the Canons of 1863. One related to (1) the use of the Scottish form of the Communion Office, which had been declared of primary authority in the Canons of 1838, while by Canon 30 of 1863 the English form was to be read "at all consecrations, ordinations, and Synods"; and while the right of congregations using the Scottish form was reserved, it was no longer declared "of primary authority." The other was based on the fact that by Canon 29 of 1863 the Book of Common Prayer was declared to be "the service book of the Church for all purposes to which it is applicable," while in Canon 28 of 1838 it was only said that "in the performance of morning and evening service the words and rubrical directions of the English Liturgy shall be strictly adhered to." In regard to the first of these points, the above judges held there was no uniform practice prior to the Canons of 1863; and as regards the second, that the form of the Church of England Prayer-Book had been used in the Scottish Episcopal Church, and is referred to in the Canons of 1838, for the services of burial and visitation of the sick—the two services which the appellant specially founded on as altered by the effect of the Canons

<sup>1</sup> Secs. 8 and 9, *infra*.

<sup>2</sup> 1865, 4 M. 143; *affd. ut supra*.



of 1863. In any view, they held the alterations made were within the power of alteration reserved by Canon 33 of 1838 to a General Synod, "to alter, amend, and abrogate the Canons in force, and to make new Canons."

861. As this Canon is, with the substitution of the word "enact" for the word "make," and "Provincial" for "General" Synod, re-enacted by s. 22 of Canon 48 in the existing Code of Canons of 1911, these opinions are of importance as regards the power of alteration by the Synod under the Canons. But the point decided was that the Civil Court will not inquire into the merits of acts, decisions, or sentences of the appropriate ecclesiastical body or authority according to the constitution of a non-established Church unless pecuniary or patrimonial damage is alleged.

#### SECTION 5.—JURISDICTION OF CIVIL COURTS.

##### SUBSECTION (1).—*Jurisdiction confined to Civil Consequences.*

862. It has been for some time a settled rule of Scottish as well as English law that the jurisdiction of the Civil Courts with reference to matters connected with non-established churches will not be exercised, except as to their civil or pecuniary consequences<sup>1</sup>—e.g. diversion of property from its destination,<sup>2</sup> deprivation of status,<sup>3</sup> injury to character.<sup>4</sup> Mr Forbes, the pursuer in *Forbes v. Eden*, aware of this position of the law, averred in a subsidiary part of his case that he had suffered damage by the refusal of a licence to his curate. But this was decided against him on the ground that, if the licence was wrongfully refused, the bishop who refused it, and not the Synod, was the proper party to be sued.

863. One of the cases above referred to, *Dunbar v. Skinner*, in which inquiry was allowed, concerned the Scottish Episcopal Church, and, along with the Free Church case of *M'Millan*, is important as shewing the furthest length the Scottish Courts have gone in sustaining their jurisdiction to inquire into the acts of the authorities of voluntary churches, though in fact the inquiry was not held, as both cases were disposed of otherwise. *Dunbar's* case was settled, and *M'Millan's* dismissed, as brought against the wrong parties. But it must be observed that the decision in *Dunbar*, where the alleged libel was contained in a sentence of excommunication by Bishop Skinner of Aberdeen against Sir William Dunbar, who had become a clergyman of the Episcopal Church under a special agreement, which he alleged the bishop violated, but before sentence withdrew, was based on the assumption of Sir W. Dunbar's withdrawal from the Scottish Episcopal

<sup>1</sup> *Forbes v. Eden*, *supra*; *Skerret v. Oliver*, 1896, 23 R. 468.

<sup>2</sup> *Craigdallie v. Aikman*, 1813, 1 Dow App. 1; *Smith v. Galbraith*, 6th June 1839, F.C.; *Attorney-General v. Pearson*, 1835, 7 Sim. 290; *Attorney-General v. Shore (Lady Hewley's Charity)*, 1836, 7 Sim. 309.

<sup>3</sup> *M'Millan v. Free Church*, 1861, 23 D. 1314.

<sup>4</sup> *Dunbar v. Skinner*, 1841, 11 D. 945.



Church, so that he was no longer subject to the bishop of that Church.<sup>1</sup>

864. The case of *M'Millan* was ultimately dismissed upon the ground that the proper parties had not been called. The judgment sustaining the jurisdiction was based on the ground that the sentence of deposition had been pronounced contrary to the provisions of the constitution of the Free Church, and that damages were concluded for. In the more recent case, in the United Presbyterian Church, of *Skerret v. Oliver*,<sup>2</sup> where the claim for reinstatement in the office of minister was not insisted in and there was no claim of damages, the Court would not entertain a mere action of reduction. *Skerret's* case appears to have been badly pleaded, and the decision as to the incompetency of a reduction is doubtful. If the pursuer had bound himself to bring, instead of merely reserving a right to raise, an action of damages, there seems no good reason why he should not have had the grounds on which he sought reduction, if relevant, inquired into and decided. This decision is another example of the unwillingness of the Civil Court to examine ecclesiastical sentences. The opinion of the Lord Ordinary (Kincairney), not expressly dealt with in the Inner House by counsel and the Court, but understood to be accepted, was that the Civil Court would not reinstate a minister to an office of which he is deprived by the ecclesiastical authorities of his Church, even if he was entitled to damages. The Court decided in another recent case that funds which would have belonged to an Episcopal congregation in Brechin, which had been licensed under the Acts of 1746 and 1748 but had ceased to exist, now belong to the Scottish Episcopal congregation there, and not to the United Presbyterian congregation, although it was averred the majority of the licensed Episcopal congregation had joined the Relief congregation, now united with the United Presbyterian.<sup>3</sup> The present position of the law with regard to voluntary churches restricts to so limited an extent the jurisdiction of the Civil Courts with reference to matters ecclesiastical, that few cases have been raised, and these in so limited a sphere that there are few decisions of the Court of Session which concern the Scottish Episcopal Church.

SUBSECTION (2).—*Cases in which Jurisdiction exercised  
by Civil Courts.*

865. There is no such express exclusion of the jurisdiction of the Civil Courts either generally or as to special matters, as has been attempted by the rules of other voluntary churches, *e.g.* the United Presbyterian (Rule ii. 9, 2), against suing for stipend,<sup>4</sup> and the Free Church, in its Model Trust Deed, as to the property in its churches. Consequently in any matter of proper civil jurisdiction involving pecuniary con-

<sup>1</sup> See issues, 1851, 13 D. 1217.

<sup>2</sup> 1896, 23 R. 468.

<sup>3</sup> *Burnett v. St Andrew's Episcopal Church, Brechin*, 1888, 15 R. 723.

<sup>4</sup> *Skerret v. Oliver*, 1896, 23 R. 468.

sequences, the clergy or laity of the Episcopal Church may appeal to the Courts in Scotland; but these Courts, according to the rules already explained, decline to decide any point of doctrine, or worship, or ecclesiastical government, or discipline, for which the Episcopal Church has itself provided appropriate tribunals in its Synods. The Courts have, however, entertained and decided questions of civil rights and obligations, examples of which will be found in the cases undernoted.<sup>1</sup> Special reference should, perhaps, be made to the case of *Norfor v. The Aberdeenshire Education Authority*,<sup>2</sup> by which it was decided that the Education Authorities are bound to maintain voluntary schools transferred to them under section 18 (3) of the Education (Scotland) Act, 1918,<sup>3</sup> as public schools of the same character and status as at the date of transfer.

**866.** As the Episcopal Church, like other voluntary Churches, is not a corporation recognised by law, property belonging to it must be held by trustees for it. The trustees of the property of an Episcopal church are usually certain officials of the diocese, along with certain officials or representative office-bearers of the church, and in that case it passes to their successors in office under the provision of 13 Vict. c. 13. By the constitution of the Episcopal church at Melrose, the trustees were four laymen, and the Right Reverend W. J. Harrison, then Bishop of the Diocese of Glasgow, and his successors. Melrose was transferred from the Diocese of Glasgow to the Diocese of Edinburgh, and the Court authorised the conveyance by the existing trustees to the former lay trustees and the Bishop of Edinburgh and his successors in office, so long as the church should be situated in the Diocese of Edinburgh, and thereafter to the bishop to whose diocese it might belong.<sup>4</sup>

#### SECTION 6.—INTERPRETATION OF THE CANONS.

**867.** With regard to the interpretation of the Canons, the Code of 1890, s. 51, provided that "they shall in all cases be construed in accordance with the principles of the law of Scotland. Nevertheless it shall be lawful, in cases of dispute or difficulty concerning the interpretation of their Canons, to appeal to any generally recognised principles of Canon law." This was an alteration of the earlier Canons, in which the primary rule of interpretation had been the general principles of the canon law. By canon law was meant the Roman canon law contained in the *Corpus Juris Canonici* (see CANON LAW), in so far as not inconsistent with the altered circumstances of a Reformed Church no longer subject to the jurisdiction of Rome. The appeal to the canon law in the interpretation of these Canons was not often made, and when made, as in an appeal to the Episcopal Synod with reference to an election to the Bishopric of Argyll, has not generally been

<sup>1</sup> *Pearson v. Malachi*, 1892, 20 R. 167; *Maclean*, 1897, not reported; *Brook v. Kelly*, 1893, 20 R. (H.L.) 104; *Low and Ors.*, 1865, 4 M. 45; *Petitions, Walker Trs.*, 25th Nov. 1878 and 13th Aug. 1896; *Bannerman v. Mackay*, 1865, 4 M. 45; 1896, 23 R. 949.

<sup>2</sup> 1924 S.C. 590.

<sup>3</sup> 8 & 9 Geo. V. c. 48.

<sup>4</sup> *Harrison*, 1893, 20 R. 827.

successful. There is in the revised Canons of 1911, to be afterwards referred to, no section concerning the interpretation of the Canons corresponding to s. 51 of the Code of 1890, and for all ordinary cases the principles of the civil law of Scotland are sufficient for the construction of the language of the Canons.

**868.** With regard to the part of the Canons relative to accusations, there was no similar declaration, even in the Canons of 1890, and the general principles of the criminal law of Scotland as regards procedure and evidence, in so far as not inconsistent with the Canons, would, it is thought, be followed. There have been few such accusations, the only important cases being the trials of Bishop Forbes of Brechin, before the Episcopal Synod (recorded in 1159–60 MS. Register of Episcopal Synod, ii. 417 and 436–51), and the Rev. Patrick Cheyne of Aberdeen, in 1858, before the Bishop of Aberdeen, and on appeal before the Episcopal Synod (MS. Register, ii. 343, 360, 410, 431, and iii. 313), for erroneous doctrine. There have also been a few cases of accusations of immoral conduct, but these have usually been settled without the scandal of a public trial.

#### SECTION 7.—THE REPRESENTATIVE CHURCH COUNCIL.

**869.** The General Synod of 1876 instituted the Representative Church Council, in which both laity and clergy are represented, for the administration of the financial affairs of the Church. It meets annually. Canon 45 of 1890 has been superseded by Canon 50 of 1911, which provides that “the Representative Church Council is recognised as the organ of the Church in matters of finance.” Sec. 4 of Canon 50 also provides, “but while the Representative Church Council . . . shall always give effect to canonical sentences of the Church, they shall not, in making or recommending grants, enter upon the consideration of questions of doctrine, or of modes of worship, or of discipline.” It was held, in an arbitration between Mr J. Auldjo Jamieson and the Publication Committee of the Representative Church Council that the conduct of *The Scottish Guardian*, an ecclesiastical newspaper devoted to the interests of the Scottish Episcopal Church, so as to involve the Council in indefinite pecuniary liabilities for its cost and legal liability for the matter inserted in it, was *ultra vires* of the Representative Council under its present constitution.<sup>1</sup>

#### SECTION 8.—THE CONSULTATIVE COUNCIL ON CHURCH LEGISLATION.

**870.** For many years there has been a growing feeling throughout the Church that, as regards legislation, there has not been sufficient

<sup>1</sup> *Scottish Guardian*, 8th Feb. 1895.



recognition of the position of the laity. Legislation, down to 1905, was entirely in the hands of the Provincial Synod, which consists of two chambers, viz.: (1) the First Chamber, consisting of the bishops; (2) the Second Chamber, consisting entirely of clergy, three as holding certain offices, and the others representatives elected by the seven Diocesan Synods. There was no provision by which the laity of the Church had any intimation of the questions to be considered by the Provincial Synod, or of the legislation decided upon, or of the results arrived at by the Provincial Synod. In 1904 a Commission consisting of thirty members, one-half being clergy and the other half laity, from the different dioceses, was appointed by the bishops to consider whether, under the Canons of 1890, there was any mode by which the mind of the whole Church could be ascertained on questions of legislation, and, if not, to formulate a scheme for that purpose. This Commission made very full and careful consideration of the whole question of the position of the laity as to legislation. Their unanimous opinion was that there were no means under the Canons of 1890 by which the mind of the whole Church could be ascertained on these questions, and they framed a scheme to achieve this object. The recommendations of the Commission were submitted to, and substantially adopted by, a Provincial Synod held in 1905. Under a Canon adopted by that Synod, and duly promulgated, a new standing body was established under the name of the Consultative Council on Church Legislation.

871. By the new Canon the business of that Council is (1) to consult, if it see fit, on any subject proposed for legislation by the Provincial Synod, and to make representations thereon to the Episcopal Synod; (2) to consult concerning any subject seeming to need legislative action, and, if it see fit, to make representations thereon to the Episcopal Synod. Under its Constitution, as accepted by the Episcopal Synod on 26th October 1905, this Council consists of the bishops, five clerical and five lay members nominated by the bishops, so many clerical members from each diocese as equal the number each diocese would be entitled at the time of election to elect as clerical members of the Provincial Synod, and an equal number of laymen from each diocese. This Council, at its second meeting in October 1906, resolved to undertake a complete revision of the Canons. By the end of 1910 the suggestions of the Consultative Council were submitted by the Provincial Synod to the Episcopal Synod for consideration, and after deliberation a Provincial Synod, on 7th December 1911, enacted the Code of Canons which contains the present constitution and law of the Church.

#### SECTION 9.—THE CANONS OF 1911.

872. The Canons are fifty-three in number, and are arranged in a more natural order than were the Canons of 1890, with an appendix containing twenty-nine forms. The more important alterations on the previous



code were as follows: In the election of bishops the right of nomination was extended to lay electors (Canon iv.); female as well as male communicants were given a right to take part in the election of lay electors (Canon v.); power was given to bishops to appoint commissaries for a limited period (Canon vi.); rectors absenting themselves from their cures without having made due provision for the supply of Sunday services were rendered liable to deprivation (Canon xiii.); the services of the Book of Common Prayer and the Scottish Liturgy or Communion Office, adopted by Episcopal Synod on 7th December 1910, were declared authorised for all purposes for which they are applicable. Congregations by whom an earlier text of the Scottish Office was in use in 1910 were permitted to continue the use of such text. Canonical sanction was also given to numerous additions to, and deviations from, the authorised services (Canon xxi.), and these additions and deviations were placed for convenience in an appendix (No. xxix.); in the use of the authorised offices for Holy Communion power was given to stated majorities to introduce a change of usage (Canon xxiii.). Canon xxvii. re-enacted the prohibition of the solemnisation of Holy Matrimony for parties within the forbidden degrees, and prohibited the clergy from solemnising Holy Matrimony for persons, either of whom has had a previous marriage dissolved *quoad civilia* by a Civil Court, so long as the other spouse in the dissolved marriage remains alive. New Canons (xxx. and xxxi.) were passed as to vestures and ecclesiastical ornaments, and Canons providing for districts to be assigned to cures of souls (Canon xxxiv.), and requiring rectors to keep rolls of communicants (Canon xxxvii.). The Canons regulating procedure in cases of accusation and appeal were recast and thrown into one (Canon li.), and a new Canon added (lii.) regulating the mode in which differences and disputes in congregational affairs are to be disposed of. In the last Canon the process for serving notices is defined, and certain terms employed in the Canons are interpreted.

## CHURCHYARD.

*See* BURIAL AND CREMATION; CHURCH.

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## CIRCUIT CLERKS.

## CIRCUIT COURTS.

*See* JUSTICIARY, HIGH COURT OF; SMALL DEBT COURT.

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## CIRCULAR NOTES.

*See* BANK.

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## CIRCUMVENTION.

*See* FRAUD.

# CITATION.

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## SECTION 1.—GENERAL.

873. Citation is primarily the procedure by which the commencement or existence of some action in Court is intimated to the party or parties who have, or are believed to have, a title and interest to oppose the action. It is also the name of the process for requiring a witness to attend and give evidence in an action.

874. Originally citation was the most important step in any action, and had to be carried out with scrupulous and even meticulous accuracy. In all ancient law the first and essential requirement for commencing an action was to hale the defender before the judge. Thus in the Twelve Tables the first step in the *legis actio* was the *vocatio in jus*. In the *Leges Burgorum* there are elaborate provisions for bringing or forcing the outlander to appear before the burgh magistrate. In England the writ of *capias ad respondendum* survived until comparatively modern times, and is still, it is said, competent in Revenue cases. In our own Scots law the address in the summons, "To messengers-at-arms, our sheriffs in that part, conjunctly and severally, specially constituted," recalls a time when service of a writ was a difficult and dangerous operation, needing in all probability the assistance of a numerous and well-armed body of the pursuer's kinsmen and friends.

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GENERAL AUTHORITIES. —Campbell on Citation; Shand's Practice; Mackay's Manual of Practice; MacLaren's Practice; MacLaren's Bill Chamber Practice; Lewis's Sheriff Court Practice; Wallace's Sheriff Court Practice; Dickson on Evidence; Lewis on Evidence; Juridical Styles, vol. iii.; Scots Style Book.

In England service is usually effected by the solicitor's clerk, but Scots law has retained the more formal procedure.

**875.** Although the former importance of citation is now greatly lessened, particularly by the provision that the entering of appearance by the defender prevents his taking any objection to the regularity of the service of the action, it is yet an important step in the action and should receive attention and care, which, it is to be feared, is frequently omitted. Citation is still, however, of first-class importance in two cases: (1) when it forms part of the ground of jurisdiction, *i.e.* when the action is based on contract or delict in Scotland combined with personal citation, and (2) in the case of decrees in absence both in the Court of Session and the Sheriff Court, which may in certain circumstances, if following on personal citation, become equivalent to decrees *in foro*.<sup>1</sup>

**876.** The date of citation, and not the date of the summons, is for all purposes the date of commencement of the action,<sup>2</sup> unless where the summons has been amended.<sup>3</sup> In only one case does the Court ever dispense with citation, *i.e.* in petitions for choosing curators, etc., when service on next-of-kin is occasionally dispensed with. A summons ceases to be a warrant for citation on being called. If a summons or petition be not served within a year and day of the date of the summons, or the order for service, the action will fall.<sup>4</sup>

## SECTION 2.—CITATION IN COURT OF SESSION.

### SUBSECTION (1).—*Warrants.*

**877.** The warrant for citation in the case of any Court of Session action is contained in the will of the summons and derives its authority from the seal or signet adhibited to the summons. It is addressed primarily to messengers-at-arms, and, except so far as authorised by special statutes, can only be served by them.

**878.** In the case of petitions, authority to cite or, as it is in these cases called, to intimate, is given by the first order for intimation and service, the usual form being: "To be intimated on the Walls and in the Minute-Book in common form, and to be served as craved," *i.e.* on the respondents mentioned in the prayer of the petition. A certified copy of the petition and order is the messenger's warrant for service. In the case of postal citation, it is unnecessary that the law agent should have a certified copy. Suspensions and interdicts, and the now rare suspensions and liberations, are also served in virtue of an interlocutor of the Court ordering service.

**879.** If it is necessary to serve the action or petition on anyone outside Scotland, or on any person whose address is unknown to the

<sup>1</sup> C. of S. Act, 1868, (31 & 32 Vict. c. 100) s. 24; Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51), Rule 25.

<sup>2</sup> *Alston v. Macdougall*, 1887, 15 R. 78; *North v. Stewart*, 1890, 17 R. (H.L.) 60.

<sup>3</sup> *Sanderson & Son v. Armour & Co.*, 1922 S.C. (H.L.) 117.

<sup>4</sup> *M'Kidd v. Manson*, 1882, 9 R. 790.



pursuer or petitioner, the will of the summons or the prayer of the petition, and the order thereon, must expressly bear to authorise edictal citation.<sup>1</sup>

#### SUBSECTION (2).—*Induciæ*.

**880.** The *induciæ* are the number of days allowed to the defender or respondent within which he must, if he intends to oppose the action, enter appearance to defend. If he fails to enter appearance, decree in absence will, in actions, pass against him, except in consistorial cases, in which there must always be proof. In the case of petitions, etc., the action will in the like case proceed as unopposed.

**881.** The *induciæ* at one time varied in certain cases (*e.g.* multiple-poidings, removings, poidings of the ground, etc.).<sup>2</sup> Now, in all ordinary actions, the invariable practice is to give the stereotyped *induciæ* of seven days if within Scotland, and fourteen days if furth of Scotland or in any island of Scotland.<sup>3</sup> In special circumstances, *e.g.* to enable an adjudging creditor to preserve his *pari passu* ranking, the Court will dispense with the *induciæ*, reserving objections to the execution.<sup>4</sup>

**882.** In ordinary petitions the *induciæ* are eight days, wherever the respondents may be, even although it is known that they are at the other side of the world.<sup>5</sup> The practice is absurd and indefensible, but it is well settled. Occasionally in very special circumstances longer *induciæ* have been given. In entail petitions, unless otherwise allowed by the Court, the *induciæ* are fourteen days within Scotland, forty days in Shetland or Orkney, and sixty days if the respondent is furth of Scotland.<sup>6</sup> In practice, however, it is usual to ask in the petition, and for the Court to grant, the same *induciæ* as in ordinary actions, *i.e.* seven and fourteen days.<sup>7</sup> In suspensions, and suspensions and interdicts, the *induciæ* are specified in the first interlocutor, which is commonly: "To see and answer within eight days." In suspensions and liberations, the period is frequently reduced to forty-eight hours. In petitions for the appointment of judicial factors under the Bankruptcy Act, a period of fourteen days after service must elapse before an appointment can be made,<sup>8</sup> and in petitions for sequestration the *induciæ* are, in the case of personal service or service at the dwelling-house or place of business, usually seven and fourteen days, the latter being the fixed period where service is edictal.<sup>9</sup>

#### SUBSECTION (3).—*By Whom Writ served.*

**883.** Writs from the Court of Session must (except so far as specially authorised by statute) be served by a messenger-at-arms.<sup>10</sup> Under the

<sup>1</sup> *Miller*, 1853, 16 D. 109.

<sup>2</sup> C. of S. Act, 1868 (31 & 32 Vict. c. 100), s. 14.

<sup>3</sup> *Maclaren*, Court of Session Practice, 837.

<sup>4</sup> Entail Act, 1875 (38 & 39 Vict. c. 61), s. 12 (4).

<sup>5</sup> C.A.S., G, ii. 3; A.S., 6th January 1914.

<sup>6</sup> Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), s. 27.

<sup>7</sup> A.S., 29th June 1672.

<sup>8</sup> *M'Kidd. Petr.*, 1890, 17 R. 547.

<sup>9</sup> C.A.S., C, v. 1.

<sup>10</sup> Act 1693, c. 12.

Citation Amendment Act, 1882,<sup>1</sup> however, most writs may be served by a law agent by post, as after explained. A sheriff officer has, within the sheriffdom for which he holds authority, provided there is not there any resident messenger-at-arms, all the powers of such a messenger for the service of any summons, writ, or citation.<sup>2</sup>

SUBSECTION (4).—*Personal Citation.*

**884.** Personal citation is effected by the delivery to the defender or defenders personally, by a messenger-at-arms in presence of one witness, of a full copy, excepting the will, of the summons, with a schedule annexed, requiring him or them to appear in the Court of Session at the expiry of the *induciae*. It was formerly necessary in certain actions, *e.g.* multiplepoundings, to deliver only a copy of such part of the summons as concerned the particular defender, but this has now fallen out of use and full copies are invariably delivered. The will may be omitted, but in that case if it contains warrant to arrest or inhibit, the copy should state at the end: “(Summons containing warrants to arrest (and inhibit) signeted at Edinburgh the                      day of 19     ).” The messenger or other officer must at the time of serving have in his possession, and if required exhibit to the parties cited, his warrant, *i.e.* either the principal summons, petition, etc., or a copy certified correct by the agent in the cause.<sup>3</sup>

**885.** The following is the usual form of citation by a messenger in the case of personal service:—

I, A. D., messenger-at-arms, by virtue of a summons of                      whereof the above and the                      preceding pages are a full double, excepting the will, signeted the                      day of                      Nineteen hundred and                      years, raised at the instance of the therein-designed A. B., pursuer, in His Majesty’s name and authority lawfully summon, warn, and charge you, the also therein-designed C. D., defender, to compare before the Lords of Council and Session, at Edinburgh, or where it may happen them to be for the time, the seventh day next after the date of this citation, in the hour of cause, with continuation of days, to answer at the instance of the said pursuer in the matter libelled in the said summons, with certification, conform to the principal summons. This I do upon the                      day of                      Nineteen hundred and                      years, before and in presence of E. F., residenter in                      , witness to the premises.  
(Signed)                      A. D.

**886.** The schedule is usually attached at the end of the service copy, as this enables the description of the parties in the schedule to be shortened. If, however, it should become detached, this will not affect the validity of the citation.<sup>4</sup> The schedule must be signed by the messenger, but need not be signed by the witness.<sup>5</sup> A merely clerical

<sup>1</sup> 45 & 46 Vict. c. 77.

<sup>2</sup> Execution of Diligence (Scotland) Act, 1926 (16 & 17 Geo. V. c. 16), s. 1.

<sup>3</sup> 31 & 32 Vict. c. 100, s. 16.

<sup>4</sup> *Hamilton v. Monkland Iron and Steel Co.*, 1863, 1 M. 672.

<sup>5</sup> *Holmes v. Reid*, 1829, 7 S. 535; *Beattie v. Lee*, 1823, 2 S. 220.

error or alteration of the schedule will not affect the validity of the citation.<sup>1</sup>

**887.** The refusal of the defender to accept delivery of the service copy will not affect the validity, as the service is complete when the copy writ and schedule are tendered to the defender.<sup>2</sup> The same rule holds where the party being served in any other way deliberately prevents service of the writ upon him.<sup>3</sup> It has been suggested that the citation may be good even although the presence of the party served may have been obtained by illegal means,<sup>4</sup> but this is at least doubtful if the illegal detention is at the instance of the pursuer.<sup>5</sup>

#### SUBSECTION (5).—*Citation at Dwelling-place.*

**888.** If the messenger is unable to effect service personally, he is entitled to cite by leaving the writ and schedule at the defender's dwelling-place.<sup>6</sup> The dwelling-place must be what is known as his "domicile of citation." Normally this is any place in Scotland where he has resided for forty days continuously and from which he has not been absent for forty days prior to the date of service.<sup>7</sup> If, however, his permanent residence be in Scotland, and it is occupied by his family and servants, citation may be made there even although he may have been absent from it for more than forty days.<sup>8</sup> If he has several such residences, service at any one of them will be sufficient.<sup>9</sup> In the case of a foreigner, however, certainly, and perhaps even of a Scotsman leaving the country *animo non revertendi*, the domicile of citation ceases at once on his leaving his last residence.<sup>10</sup>

**889.** The correct procedure must be strictly adhered to. The messenger must first inquire whether the party to be cited is in the house. If so, he should insist on making personal service, and it is only if he finds this impossible that he may hand the writ to "a servant" within the dwelling-place, for his or her master.<sup>11</sup> The term "servant" used in the Act has received a very wide interpretation, and has been held to include the wife, children, and other relatives of the party, and anyone resident, even although only temporarily, in the house.<sup>12</sup> The whole procedure must take place in presence of the witness, who is in this and all other service by a messenger, not only witness to his signature but of "the whole premises."

<sup>1</sup> *Brodie v. Smith*, 1836, 14 S. 983; *Mackintosh v. Munro*, 1854, 17 D. 99.

<sup>2</sup> *Stair*, iv. 38, 15.

<sup>3</sup> *Busby v. Clark*, 1904, 7 F. 162; *International Exhibition*, 1890 v. *Bapty*, 1891, 18 R. 843.

<sup>4</sup> *International Exhibition*, 1890 v. *Bapty*, *supra*, per Lord Young.

<sup>5</sup> *Borjesson v. Carlberg*, 1878, 5 R. (H.L.) 217. <sup>6</sup> Act 1540, c. 75.

<sup>7</sup> Act 1540, c. 75; *Joel v. Gill*, 1859, 21 D. 929; 6 Geo. IV. c. 120, s. 53.

<sup>8</sup> *Fraser v. Reid & Auld*, 1821, 1 S. 76; *Thomson v. Handyside*, 1833, 12 S. 557; *Corstorphine v. Kasten*, 1898, 1 F. 287.

<sup>9</sup> *Douglas & Heron v. Armstrong*, 1779, Mor. 3700; *Macdonald v. Sinclair*, 1843, 5 D. 1253.

<sup>10</sup> *Buchan v. Grimaldi*, 1905, 7 F. 917; *Morrison v. Vallance's Exrs.*, 1907 S.C. 999; *Corstorphine*, *supra*.

<sup>11</sup> *Ersk.* ii. 5, 55.

<sup>12</sup> *A. v. B.*, 1834, 12 S. 347.



**890.** If after a reasonable endeavour to obtain an entrance to the house, or to get into communication with its inmates, the messenger fails to do so, he may either fasten the writ to the door or insert it in the key-hole. Six audible knocks are the recognised evidence of a reasonable endeavour to obtain admittance,<sup>1</sup> and the door must be the "most patent," *i.e.* the principal, or what is called the front door of the house.

SUBSECTION (6).—*Citation by Post.*

**891.** This was introduced by the Citation Amendment Act of 1882,<sup>2</sup> in order to lessen the excessive cost of service by messenger and witness in certain cases, and has very largely superseded the old methods. Under it, service may be made by a messenger or an enrolled law agent sending by registered post a letter containing the summons or other writ, with appended to it, or at least along with it, a schedule of citation, usually in the following form:

I, A. B., S.S.C., Edinburgh, law agent, by virtue of a summons of \_\_\_\_\_, whereof the above and the \_\_\_\_\_ preceding pages are a full double, excepting the will, signed the \_\_\_\_\_ day of \_\_\_\_\_ Nineteen hundred and \_\_\_\_\_ years, raised at the instance of the therein-designed C. D., in His Majesty's name and authority lawfully summon, warn, and charge you, the also therein-designed E. F., to compare before the Lords of Council and Session at Edinburgh, or where it may happen them to be for the time, the \_\_\_\_\_ day next after the date of this citation, in the hour of cause, with continuation of days, to answer at the instance of the said pursuer in the matter libelled in the said summons, with certification, conform to the principal summons.

This I do upon the \_\_\_\_\_ day of \_\_\_\_\_ Nineteen hundred and \_\_\_\_\_ years, being the date of the posting of this citation, and from which the *induciae* or period for appearance is reckoned.

, Law Agent.

**892.** The law agent must be actually enrolled.<sup>3</sup> The fact that the agent is a party to the action does not affect the validity of the service.<sup>4</sup> The Act stipulates (s. 3) that the letter must be addressed to the defender or respondent "at his known residence or place of business," or "his last known address if it continues to be his legal domicile or proper place of citation," which means, it is thought, that it must be sent to the place at which personal service or service at the dwelling-place would have been competent.

**893.** The schedule of citation must (s. 4 (1)) specify the date of posting and state that the period of appearance is reckoned from that date. The *induciae* are reckoned from twenty-four hours after the date of posting (s. 4 (2)). The two provisions are inconsistent, but it has been held<sup>5</sup> that, if the form given in the schedule be adhered to, it is

<sup>1</sup> Act 1540, c. 75; *Duff v. Gordon*, 1707, Mor. 3775.

<sup>2</sup> *Kerr, Petr.*, 1906, 14 S.L.T. 412.

<sup>3</sup> 45 & 46 Vict. c. 77.

<sup>4</sup> *Addison v. Brown*, 1906, 8 F. 443.

<sup>5</sup> *Addison, supra*; *Alston v. Macdougall*, 1887, 15 R. 78.



no objection that the extended period allowed for appearance is not mentioned.

The envelope must bear on its face (s. 4 (2)) the following statement: "This letter contains a citation to or intimation from the Court of Session. If delivery of the letter cannot be made, it is to be returned immediately to \_\_\_\_\_, D.C.S., No. \_\_\_\_\_, New Register House, Edinburgh." The insertion of the name of a particular clerk of Court does not make it necessary to call the action in his office.

**894.** In the case of petitions, the interlocutor ordering service must be copied at the end of the petition, and the schedule of citation will be in the following form:

I, A. B., S.S.C., Edinburgh, law agent, by virtue of a deliverance dated the \_\_\_\_\_ day of \_\_\_\_\_ Nineteen hundred and \_\_\_\_\_ years, pronounced by Lord \_\_\_\_\_ Ordinary upon the petition given in and presented for and in name of the therein-designed C. D., do hereby, in His Majesty's name and authority, and in name and authority of the said Lord \_\_\_\_\_, lawfully serve the foregoing copy of said petition and deliverance upon you, the also therein-designed E. F., that you may not pretend ignorance of the same, and desire and require you to lodge answers to said petition, if so advised, within \_\_\_\_\_ days from the date of this my service, in terms of said deliverance.

This I do upon the \_\_\_\_\_ day of \_\_\_\_\_ Nineteen hundred and \_\_\_\_\_ years, being the date of the posting of this citation, and from which the *induciae* or period for appearance is reckoned.

\_\_\_\_\_, Law Agent.

**895.** If for any reason the letter cannot be delivered, it will be returned to the clerk of Court, whose name appears on the envelope, who will intimate the fact of its return to the law agent who served the writ (s. 4 (5)). He will also in that event submit the letter to the Lord Ordinary, who will decide whether personal service or renewed postal service is needed, or he may hold that sufficient intimation has been given. As in the case of personal citation, tender of the letter at the proper address will usually be held sufficient even although delivery may have been refused.<sup>1</sup> It is not necessary that the letter be actually delivered to the party cited. It is enough if it is given to and the receipt signed by a duly authorised person, *i.e.* it is thought any person in whose hands citation at dwelling-place could have been made.<sup>2</sup>

**896.** Postal service is optional, the alternative of citation by messenger being always open, but (unless there is some doubt as to the effectiveness of postal service, as *e.g.* where the party resides beyond a postal district,<sup>3</sup> or special service is ordered by the Court) only the cost of postal service can be recovered.<sup>4</sup>

<sup>1</sup> 45 & 46 Vict. c. 77, s. 4 (5); *Roberts v. Crawford*, 1884, 22 S.L.R. 135; *Spaulding & Co. v. Marjoribanks*, 1903 (O.H.), 11 S.L.T. 71; *Busby v. Clark*, 1904, 7 F. 162; *Mathieson v. Fraser*, 1911 (O.H.), 2 S.L.T. 493; *Clark-Kennedy v. Clark-Kennedy*, 1908 (O.H.), 15 S.L.T. 844.

<sup>2</sup> *Stewart v. Ree*, 1885, 12 R. 563.

<sup>3</sup> *Macleod v. Davidson*, 1887, 14 R. 298.

<sup>4</sup> 45 & 46 Vict. c. 77, s. 6.

SUBSECTION (7).—*Edictal Citation.*

**897.** This is the procedure by which parties over whom the Court has jurisdiction, but who are in fact, or are on sufficient grounds believed to be, inaccessible by other methods of service, are cited. Until 1825, the old symbolic procedure was retained of citing an absent defender at the Mercat Cross of Edinburgh and Pier and Shore of Leith. Now the world outside Scotland is represented by an office in the New Register House in Edinburgh. The statutory condition on which edictal citation is competent is <sup>1</sup> that the party shall be furth of Scotland or, “not having a dwelling-house in Scotland occupied by his family or servants, shall have left his usual place of residence and have been therefrom absent during the space of forty days, without having left notice where he is to be found within Scotland.” Mere concealment by the defender or his friends of his actual address will not authorise edictal citation; <sup>2</sup> but it is competent where the defender has led the pursuer to believe that he has left Scotland.<sup>3</sup>

**898.** Service may be made either by a messenger-at-arms, at the office of the Keeper of Edictal Citations, or by postal service on that official. The latter is the form commonly used. One copy of the writ and schedule of citation is sufficient for any number of parties cited edictally. The schedule must, however, bear the names of all the parties to whom the citation applies. If the service is by post, the letter is addressed “To the Keeper of Edictal Citations, New Register House, Edinburgh,” without any indication on the outside of the parties for whom it is intended. If the party cited have a known residence or place of business in England or Ireland, a copy of the writ and of the citation must also be posted to that address in a registered letter, as under postal service. If the defender has a known agent in Scotland, the notice may be sent to him.<sup>4</sup> This provision is important, as a decree in absence against a defender designed as carrying on business in some particular place in England or Ireland must state that the Lord Ordinary has been satisfied on proof that reasonable notice has been given as above.<sup>5</sup>

**899.** If it is doubtful whether the party is furth of Scotland or not, the safe practice is to serve both at the last-known address or addresses in Scotland, and edictally.<sup>6</sup> The fact of the writ having been served edictally is published to the world in a fortnightly publication called the List of Edictal Citations.<sup>7</sup> Its circulation is believed to be limited.

<sup>1</sup> 6 Geo. IV. c. 120, ss. 51 and 53.

<sup>2</sup> *Robertson v. M'Culloch*, 1836, 14 S. 950.

<sup>3</sup> *Sandbach & Co. v. Caldwell*, 1825, 4 S. 171.

<sup>4</sup> C.A.S., C, i. 6; *Duke of Atholl v. Robertson*, 1872, 10 M. 298.

<sup>5</sup> C.A.S., *supra*.

<sup>6</sup> *Morrison v. Vallance's Exrs.*, 1907 S.C. 999; *Gibson v. Clark*, 1895, 23 R. 294; *Corporation of Glasgow v. Johnston*, 1915 S.C. 555.

<sup>7</sup> 6 Geo. IV. c. 120, s. 51.

SUBSECTION (8).—*In Consistorial Causes.*

**900.** In these, if the defender be in Scotland, the service should be personal. Postal service may, however, be admitted as sufficient, if, in addition to the ordinary post office receipt attached to the execution, there is produced a receipt (known as an A.R. receipt) under the hand of the defender acknowledging receipt of the letter containing the writ. An admission by or on behalf of the defender that he has actually received the writ will, as a rule, be accepted.<sup>1</sup> If the defender's residence is known, but is furth of Scotland, he may be cited by any person duly authorised for the purpose, *e.g.* in possession of a certified copy of the warrant for service.<sup>2</sup> The service must be, as in personal service, by delivery of the summons with schedule of citation appended. Omission of the schedule will be fatal to the citation.<sup>3</sup> If it be proved to the satisfaction of the Court that the defender cannot be found, edictal citation will be held valid, provided<sup>4</sup> the summons has also been served on the children of the marriage, if any, and on one or more of the next-of-kin of the defender, exclusive of the children of the marriage, when the said children are known and resident within the United Kingdom.<sup>5</sup> In an undefended action of divorce for adultery, if the co-defender is not cited at the outset of the case, the action must, unless on cause shewn,<sup>6</sup> be intimated to him or her before fixing a diet for the proof.<sup>7</sup> Such intimation will be in the form of the schedule given in the Act of Sederunt.<sup>8</sup>

SUBSECTION (9).—*Of Lunatics.*

**901.** If resident within Scotland, lunatics should be cited personally. In petitions for appointment of *curators bonis*, personal service is always ordered, unless the certifying doctor or the doctor under whose charge the lunatic is certifies that personal service would be dangerous to the health of the patient. On production of such a certificate, service on the lunatic will usually be dispensed with.<sup>9</sup> If the lunatic be resident furth of Scotland, the proper course appears to be to serve edictally and to have a copy of the summons or writ and order to serve, with schedule of citation subjoined, delivered to the *incapax* by a person duly authorised (*i.e.* having in his possession a certified copy of the writ and order for service). The medical man under whose

<sup>1</sup> *Smijth v. Smijth*, 1918, 1 S.L.T. 156; *Clark-Kennedy v. Clark-Kennedy*, 1908, 15 S.L.T. 844.

<sup>2</sup> 31 & 32 Vict. c. 100, s. 100.

<sup>3</sup> *Colvin v. Colvin*, 1923, S.L.T. 728.

<sup>4</sup> *Conjugal Rights Act*, 1861 (24 & 25 Vict. c. 86), s. 10.

<sup>5</sup> *M'Callum v. M'Callum*, 1865, 3 M. 550; Fraser, H. and W. ii. 1545; *Clark-Kennedy v. Clark-Kennedy*, *supra*.

<sup>6</sup> *Thomson v. Thomson*, 1912, 2 S.L.T. 138; *Harley v. Harley*, 1924, S.L.T. 815.

<sup>7</sup> *Clark-Kennedy v. Clark-Kennedy*, 1908, 16 S.L.T. 66.

<sup>8</sup> C.A.S., C, iv. 2.

<sup>9</sup> *M'Kechnie*, 1890, 27 S.L.R. 261; *Buyers*, 1910, 2 S.L.T. 201.

charge the lunatic is seems the most appropriate person to make such service, so long as he has no personal interest in the action.

SUBSECTION (10).—*Of Particular Parties.*

**902.** Certain corporations of the larger cities are cited in terms of special statute, other town councils are cited by service on the town clerk.<sup>1</sup> Other corporations are cited at their business domicile.<sup>2</sup> County councils, parish councils, and education authorities are all corporations and are cited as such. Companies under the Companies Clauses Act, 1845, and railway companies are cited in the person of their secretary at a principal office.<sup>3</sup> Companies under the Companies' Act may be cited at their registered office.<sup>4</sup> Promoters of companies may be cited at their principal office, or personally by post on the secretary or solicitor of the promoters.<sup>5</sup> Industrial and provident societies and building societies are cited at their registered office; friendly societies by personal service on the officer or person sued on behalf of the society or branch, or at the place of business of the society or branch, or if that be closed by posting a copy on the outer door; if not so served, a copy must be sent by post to the committee at the society or branch's registered office.<sup>6</sup> Proper firms are cited at the place of business, and descriptive firms at the place of business of the firm, service being made on three partners, if so many. As to unincorporated societies or voluntary associations, see the undernoted cases.<sup>7</sup> The General Assembly of the Church of Scotland is cited by service on the Moderator, first and second clerks, and Procurator;<sup>8</sup> Presbyteries and Kirk-Sessions by service on each member and the clerk.

**903.** In actions against the Crown or a public department, service is made on the Lord Advocate at the Exchequer Office.<sup>9</sup>

**904.** For the purposes of the Merchant Shipping Act, citation is good if made personally on the person to be served or at his last place of abode, or by leaving the summons or other writ for him with the person apparently in command of the ship, or, if there is no master, on the managing owner or owner's agent, or by fixing a copy to the mast of the ship.<sup>10</sup>

<sup>1</sup> Town Councils Act, 1900 (63 & 64 Vict. c. 49), s. 9.

<sup>2</sup> *Corporation of Glasgow v. Watson*, 1898, 35 S.L.R. 508; *Campbell v. MacAlister*, 1898, 5 S.L.T. 334; Citation Act, 1882 (45 & 46 Vict. c. 77), ss. 3 and 7.

<sup>3</sup> *Stewart v. Scottish Midland Junction Rly. Co.*, 1852, 14 D. 594.

<sup>4</sup> Companies Act, 1908 (8 Edw. VII. c. 69), s. 116.

<sup>5</sup> Lands Clauses Act (8 & 9 Vict. c. 19), s. 128.

<sup>6</sup> Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 94.

<sup>7</sup> *Skerret v. Oliver*, 1896, 23 R. 468 (Presbytery and Synod); *Bridge v. South Portland Street Synagogue*, 1907 S.C. 1351 (Synagogue); *Boyd v. Hislop*, 1903, 40 S.L.R. 869 (Licensing Justices); *Renton Football Club v. M'Dowall*, 1891, 18 R. 670.

<sup>8</sup> *Cruickshank v. Gordon*, 1843, 5 D. 909.

<sup>9</sup> 20 & 21 Vict. c. 44, s. 51.

<sup>10</sup> Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 696.



SUBSECTION (11).—*Execution of Citation.*

**905.** The memorandum or certificate by the messenger or law agent who carries out the citation is usually called the execution of citation. It must contain (1) the name and designation of the messenger; (2) a description of the writ served and (if that be separate) the warrant or order for service; (3) the name and designation (in full or by reference to the writ) of the person cited; (4) the time, place, and method of citation; and—in the case of service other than postal—(5) the name and designation of the witness.<sup>1</sup> In the Court of Session the execution was primarily of necessity and is still in practice written, typed, or printed at the end of the summons or other writ on continuous sheets, each page of which should be signed by the messenger or law agent. In the case of petitions certainly, and perhaps also of other writs, the practice has now been relaxed and an execution partly on a printed form and partly written and gummed or otherwise attached at the end of the writ has been accepted.<sup>2</sup>

**906.** Provisions as to the execution of citations will be found in the Act 1681, c. 5; the Debtors Act, 1838;<sup>3</sup> the Citation Act, 1846; and the Court of Session Act, 1850.<sup>4</sup> Schedule B to the 1850 Act gives the statutory form for an execution by a messenger, and should be followed as closely as circumstances will permit. In the case of a summons personally executed, it is as follows:

This summons executed by A. B., messenger-at-arms, against X. Y., defender, by delivering to him personally a full double thereof (excepting the will) having a just copy of citation subjoined in presence of C. D. (*name and designation of witness*), witness to the premises and hereto with me subscribing this  
day of                      192    years.

(*Signatures of messenger and witness.*)

Where personal service has not been effected but delivery of the writ is made to a “servant,” or where, the house being shut, the writ has, after six audible and ineffectual knocks, been affixed to the door or inserted in the keyhole, the execution will so narrate the facts.

**907.** In the case of postal citation under the 1882 Act, the execution should adhere as closely as possible to the form in the schedule to the Act. The signature to the execution should be that of the law agent or messenger who actually signed the schedule of citation. The signature of a clerk or apprentice is not enough.<sup>5</sup> The law agent must be actually on the roll at the date of citation.<sup>6</sup>

<sup>1</sup> *Stewart v. Macdonald*, 1860, 22 D. 1514.

<sup>2</sup> *Hunter*, 1908 (O.H.), 15 S.L.T. 716; *Kennedy v. Murphy*, 1863, 2 M. 232.

<sup>3</sup> 1 & 2 Vict. c. 114, s. 32.

<sup>4</sup> 13 & 14 Vict. c. 36, s. 20.

<sup>5</sup> *Wilson*, 1885, 13 R. 342.

<sup>6</sup> *Kerr*, 1906, 14 S.L.T. 412; Execution of Diligence (Scotland) Act, 1926 (16 & 17 Geo. V. c. 16), s. 2 (4).

**908.** The usual form of execution of a summons by post against a defender within Scotland is as follows:

This summons executed by me, A. B., enrolled law agent, against X. Y., defender, therein designed, by posting on (*day, date, and month*) last between the hours of                      and                      o'clock fore (*or after*) noon at the                      Post Office, Edinburgh (*or as the case may be*), a copy of the same (excepting the will, *if that be so*) with citation subjoined in a registered letter addressed as follows, viz.: "Mr. X. Y., Draper, Z. Street, L.," and the post office receipt for said registered letter accompanies this execution.

**909.** It is not competent to supply omissions in the execution by parole evidence. As to the effect of discrepancies between the schedule of citation and the execution, see the cases undernoted.<sup>1</sup> If the details necessary for a valid citation are duly set forth in the execution, and there is on the face of it no apparent error, it can only be challenged in a reduction or perhaps in the Sheriff Court *ope exceptionis*.<sup>2</sup> As already stated, a party appearing in answer to a citation cannot object to the regularity of the execution,<sup>3</sup> but this does not apply, it is thought, when the citation is part of the foundation of jurisdiction.<sup>4</sup>

### SECTION 3.—CITATION IN SHERIFF COURT.

#### SUBSECTION (1).—*Preliminary.*

**910.** What may be called the common law of citation applies, unless so far as varied by statute or inveterate practice, equally to citation in the Court of Session and the Sheriff Court. Such variations only are here noted, and on matters not specially dealt with reference should be made to what is said in the preceding part of this article. As in the Court of Session, the date of citation is the date of commencement of the action.<sup>5</sup> In the Sheriff Court also appearance by the defender bars any objection by him to the regularity of the execution of service, except where the jurisdiction is founded on the citation or on arrestment to found jurisdiction (Rule 13).<sup>6</sup>

#### SUBSECTION (2).—*Warrants.*

**911.** The warrant for citation on an action in the Sheriff Court is always an order of Court. It is signed by the Sheriff-Clerk in the ordinary case; but if it varies the normal *induciæ* or includes an order

<sup>1</sup> *Gibson v. Clark*, 1895, 23 R. 294; *Lochrie v. M'Gregor*, 1911 S.C. 21; *Wilson v. Gorman*, 1924 (O.H.), S.L.T. 112.

<sup>2</sup> *Tait v. Johnston*, 1891, 18 R. 606; *Gibson, supra*; *Rachkind v. Donald & Sons*, 1916 S.C. 751; Sheriff Courts Act, 1907, Rule 50.

<sup>3</sup> 31 & 32 Vict. c. 100, s. 21.

<sup>4</sup> *Gairdner v. MacArthur*, 1918, 2 S.L.T. 123.

<sup>5</sup> *Alston v. Macdougall*, 1887, 15 R. 78; *Gibson v. Clark*, 1895, 23 R. 294.

<sup>6</sup> Except where otherwise stated, the references in the text are to the Sheriff Courts (Scotland) Act, 1907, and the Rules thereof.

(e.g. interim interdict) other than the ordinary order to cite and for answers, it must be signed by the Sheriff or his Substitute.<sup>1</sup> There are two statutory forms—one for the normal case (Sheriff Courts Act, Form C), the other applicable only to summary cases, summary removings and other summary applications requiring to be served, and also cases under the Workmen's Compensation Acts (Form B). If desired, the warrant may contain authority to cite edictally (Rule 7). It is thought that, as in the Court of Session, the warrant for service ceases to be effectual if not executed within a year and day of its date. If the Sheriff is dissatisfied with the service on a non-compearing defender, he may make such order for service of new as he thinks fit (Rule 12).

#### SUBSECTION (3).—*Induciae.*

**912.** In the ordinary case (Form C) the *induciae* are seven days if the defender is within Scotland, fourteen days if he is in Orkney or Shetland or in any other island of Scotland, or if he is furth of Scotland (Rule 5). If the warrant contain authority to cite the defender edictally, the *induciae* must be fourteen days. The Sheriff may shorten or lengthen the *induciae*, but he may not make them less than forty-eight hours (Rule 6).<sup>2</sup> In summary actions shorter *induciae* are usually fixed.

#### SUBSECTION (4).—*By Whom served.*

**913.** All Sheriff Court warrants of citation must be executed by a sheriff officer, either of the Sheriff Court granting the warrant, or of the Sheriff Court within whose jurisdiction the action is to be served (Rule 10). Before the Sheriff Courts Act, 1907, it was held in several cases<sup>3</sup> that Sheriff Court writs might be served by messengers-at-arms, and it is thought that this procedure is not excluded by the Sheriff Courts Acts. Service may also be made by an officer or enrolled law agent under the Citation Act, 1882.

#### SUBSECTION (5).—*Personal Citation.*

**914.** This is effected by a sheriff officer, in the presence of one witness, delivering or offering to the defender personally a copy of the initial writ and of the warrant to cite, with a schedule of citation in Form D attached to the Act (Rules 8 and 9).

The service copy writ must have the name and address of the pursuer's agent endorsed upon it (Rule 3).

<sup>1</sup> Sheriff Courts Act, Rule 7.

<sup>2</sup> *Muir v. More Nisbett*, 1881, 19 S.L.R. 59.

<sup>3</sup> *Cheyne v. M'Gungle*, 1860, 22 D. 1490; *Sutherland v. Standard Life Assurance Co.*, 1902, 4 F. 957.

Form D is as follows:

(Place and date, and, if necessary, hour) C. D., defender. You are hereby served with the foregoing (or within-written) writ and warrant and required to answer thereto, conform to the said warrant. (If posted, and if necessary, add, the *induciae* is reckoned from twenty-four hours after date of posting.)

(To be signed) P. Q., Sheriff Officer,

or

X. Y. (add designation and business address),  
Pursuer's Agent.

SUBSECTION (6).—*Citation at Dwelling-place.*

915. The procedure stated and authorities cited under Court of Session, *supra*, apply equally to citation to the inferior Court. As there, the statutory origin of the power is the Act 1540, c. 75.

SUBSECTION (7).—*Citation by Post.*

916. This is governed by the Citation Amendment Act, 1882, except as regards the schedule of citation, which may be in the form of Schedule D, *supra*.

SUBSECTION (8).—*Edictal Citation.*

917. This is executed as in the Court of Session by the sheriff officer delivering or by the officer or law agent posting to the Keeper of Edictal Citations, New Register House, Edinburgh, a copy of the writ and order of service with a schedule of citation stating the party or parties who are being cited subjoined (Rules 7 and 15). The keeper must acknowledge receipt of the letter (Rule 15). If the defender has a known residence or place of business in England or Ireland, a copy of the writ, order, and schedule must at the same time be posted to him at that address in a registered letter (Rule 15).

SUBSECTION (9).—*Of Particular Parties.*

(i) *Companies and Firms.*

918. "Any individual or individuals or any corporation or association carrying on business under a firm or trading or descriptive name" may be cited at "the principal place where such business is carried on (including the place of business or office of the clerk or secretary of any corporation or association) when such place is within the jurisdiction of the Sheriff Court in which the action is brought, or otherwise at any place of business or office at which such business is carried on within the jurisdiction" (Rule 11). Citation at a place of business will, however, only be effectual as long as the business is actually carried on there.<sup>1</sup>

<sup>1</sup> *Bruce v. British Motor Trading Corporation*, 1924 S.C. 908.



A defender in Scotland, but outwith the sheriffdom in which the action depends, can now be cited in another sheriffdom without the necessity for the warrant being endorsed (Rule 10).

(ii) *Minors.*

**919.** These are cited by service in the ordinary way on the minor and also on his father as his curator-at-law, or otherwise on the minor and his tutors and curators if known. If service cannot be made on the father or the tutors or curators, the latter may be cited edictally (Rule 14).

SUBSECTION (10).—*Execution of Citation.*

**920.** The execution, whether by an officer or postally by a law agent, may (Rule 8) be in Form E annexed to the Sheriff Court Act, which is as follows:

(Place and date) I, \_\_\_\_\_, do hereby certify that upon the \_\_\_\_\_ day of \_\_\_\_\_  
(if necessary add, between the hours of \_\_\_\_\_ and \_\_\_\_\_) I duly cited C. D., the  
defender (or respondent), to answer to the foregoing (or within-written) writ.  
This I did by (set forth mode of service; if by officer and not by post add, in presence  
of L. M. (design him)), witness hereto with me subscribing.

(To be signed)

P. Q., Sheriff Officer,

L. M., Witness,

or

X. Y. (add designation and business address),  
Pursuer's Agent.

If executed by an officer, it must be signed by him and one witness, must be appended to or endorsed on the principal writ, and must specify that the citation was personal or whatever other form of service has been effected (Rules 8 and 9). In the case of edictal citation of a defender residing or having a place of business in England or Ireland, the execution must include the posting of the copy to his address there, and the certificate of posting must be attached (Rule 15). Objections to an execution of citation can apparently in the Sheriff Court be pleaded *ope exceptionis* (Rule 50).

SUBSECTION (11).—*In Small Debt Cases.*

**921.** Citation in small debt actions is still mainly governed by the provisions of the Small Debt Act, 1837.<sup>1</sup> The warrant is the principal writ and order for service. The service copy must, where an account is sued for, be accompanied by a copy of that account. Service may be personal, at the dwelling-place, or postal; and edictally where required. In the case of a company it may be at its ordinary place of business.<sup>2</sup> No witness is needed.<sup>3</sup> Keyhole citation is inadvisable. If the officer

<sup>1</sup> 1 Vict. c. 41.

<sup>2</sup> *Ibid.*, s. 3.

<sup>3</sup> Citation Act, 1871 (34 & 35 Vict. c. 42), s. 4.

is satisfied that the party is refusing access or concealing himself, or has removed to an unknown address within forty days, he may leave the writ at the place from which he has removed, but must in that case also send a copy in a registered letter to the last known address.

922. The following rules of the Sheriff Courts Act apply to small debt cases: The writ may be served in another sheriffdom without endorsement; a firm or individual using a descriptive name may be cited at the place of business; the Sheriff may order service of new; parties appearing cannot object to the service; unknown tutors and curators and parties furth of Scotland may be cited edictally. As in the Sheriff Court, objections to the citation may be pleaded, when not barred by appearance, *ope exceptionis* (Rule 50).

#### SECTION 4.—ACCEPTANCE OF SERVICE.

923. As a substitute for actual citation, the party to be cited or his duly authorised law agent may accept service of the writ. No particular form of words is necessary, but the docquet which must be written at the end of the summons or other writ must be holograph of the defender or agent, or tested. The following is a usual style when by an agent:

(Place and date) I accept service of the foregoing writ on behalf of the defender (or if on behalf of only one of several defenders, the defender A. B.).

(Signed) X. Y.,

Agent of the said defender (or A. B.).

The defender or agent may at the same time, by adding the words "and dispense with the *inducia*," enable the pursuer to call the action at once, without awaiting the expiry of the *inducie*.

Service should not be accepted in actions of constitution and adjudication where the citation has a certain statutory effect,<sup>1</sup> or, it is thought, wherever the decree is or may be a step in a feudal title.

#### SECTION 5.—CITATION OF WITNESSES.

##### SUBSECTION (1).—*In Scotland.*

924. For a proof or jury trial before a Lord Ordinary, the interlocutor fixing the diet contains the warrant to cite witnesses and havers.<sup>2</sup> In the Sheriff Court the practice is the same (Rule 71). For a jury trial at the sittings, letters of diligence must be obtained.<sup>3</sup> They are signed by the clerk of Court and must pass the Signet. No names of witnesses are inserted. Witnesses may be cited either personally, by a messenger-at-arms or in Sheriff Court actions by a sheriff officer, or in either Court

<sup>1</sup> Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), s. 60.

<sup>2</sup> C. of S. Act, 1850 (13 & 14 Vict. c. 36), s. 43.

<sup>3</sup> For form, see Maclaren's Court of Session Practice, p. 343.

postally, by messenger, officer, or law agent. If there is no messenger in the county, witnesses may be cited to the Court of Session by a sheriff officer.<sup>1</sup> An *induciae* of forty-eight hours prior to the diet of proof or trial must be given, and in the case of postal citation the forty-eight hours will not commence to run until twenty-four hours after the time of posting the citation (Rule 71).<sup>2</sup> Printed forms are ordinarily used both in Court of Session and Sheriff Court. The form of postal citation used in the Court of Session is as follows:

I, A. B., law agent, by virtue of an interlocutor, dated the                      day of 19                      , pronounced by Lord                      Ordinary, in the action raised at the instance of C. D. (*designation*) against E. F. (*designation*), in His Majesty's name and authority lawfully summon, warn, and charge you, X. Y. (*designation and address*), as a witness, to compare before the said Lord                      , and that within the Parliament House, Parliament Square, Edinburgh, upon the                      day of Nineteen hundred and                      years, at                      o'clock forenoon, with continuation of days, to answer at the instance of the said pursuer (*or defender*); THAT IS TO SAY, to bear leal and soothfast witnessing, and give and declare your oath of verity, in so far as you know or shall be interrogated, respecting the points and articles admitted to probation; with certification as effeirs.

This I do upon the                      day of                      19                      , being the date of the posting of this citation.

Law Agent.

The execution may follow that given in the 1882 Act. In the Sheriff Court the forms for the schedule of citation and the execution are Forms F and G appended to the Act.

925. If the judge is satisfied that the letter has been tendered at the witness's proper address, he may at once issue letters of second diligence,<sup>3</sup> under which the witness may be arrested and brought to the proof or trial. Citation on letters must be accompanied with a tender of reasonable travelling expenses, usually called "conduct-money." They authorise apprehension of the defaulting witness. He does not in that case get his expenses.<sup>4</sup> In the Sheriff Court a witness duly cited on the proper *induciae*, and who has been tendered his travelling expenses if required, is liable to a penalty not exceeding 40s. if he without adequate cause fails to appear (Rule 71).

#### SUBSECTION (2).—*In England and Northern Ireland.*

926. Where witnesses who reside in England or Northern Ireland will not attend without citation, the agent lodges a note, addressed to the Lord Ordinary or President of the Division, setting forth his belief that the witnesses will not attend unless commanded by the Court. An affidavit by the agent that their evidence is necessary and material

<sup>1</sup> 16 & 17 Geo. V. c. 16, s. 1.

<sup>2</sup> 1882 Act (45 & 46 Vict. c. 77), s. 4 (2).

<sup>3</sup> 45 & 46 Vict. c. 77, s. 4 (5).

<sup>4</sup> *Mason*, 1830, 5 *Murray* 129.

has in several instances been held necessary; <sup>1</sup> but in recent practice it is sufficient if such a statement is made in the note and signed by counsel.<sup>2</sup> The cause is then enrolled before the Lord Ordinary or the Court, and warrant is granted to cite such witnesses if the Court is satisfied that their evidence is material.<sup>3</sup> The warrant must bear a certificate by the clerk of the process that it is issued by the special order of the judge or Court, and when it is served, a reasonable and sufficient sum of money to defray the expenses of the witnesses must be tendered to them.<sup>4</sup> If a witness will not attend, the Lord Ordinary may issue warrant for his arrest, which will be enforced by the English or Irish Court.<sup>5</sup> The Court will not compel the attendance of such witnesses if they are only required to give evidence of opinion.

For citation in criminal cases, see CRIME (PROCEDURE). For citation of jurors, see JURIES.

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<sup>1</sup> *Macdonald v. Highland Rly. Co.*, 1892, 20 R. 217.

<sup>2</sup> *Northern Garage Co. v. N. B. Motor Co.*, 1908, 16 S.L.T. 573.

<sup>3</sup> *Duke of Athole v. Robertson*, 1878, 5 R. 845.

<sup>4</sup> Attendance of Witnesses Act, 1854 (17 & 18 Vict. c. 34).

<sup>5</sup> *Vegetable Oils Products Co.*, 1923, S.L.T. 114.

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## CITATION OF JURY.

*See* JURIES.

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## CIVIL IMPRISONMENT.

*See* DILIGENCE OF CREDITORS; IMPRISONMENT  
FOR DEBT.



## CIVIL LAW.

*See* LAW; ROMAN LAW.

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## CIVIL LIST.

*See* NATIONAL FINANCE.

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## CLAIM.

*See* ELECTION LAW; MULTIPLEPOINDING;  
SEQUESTRATION.

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## CLARE CONSTAT, WRITS AND PRECEPTS OF.

*See* COMPLETION OF TITLE.

## CLASS GIFT.

*See* VESTING IN SUCCESSION.

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## CLAY.

*See* MINES AND MINERALS; RAILWAYS; SUPPORT;  
WATER.

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## CLERICAL ERROR.

*See* CRIME (PROCEDURE); DEEDS; PRACTICE AND  
PROCEDURE.

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## CLERK OF THE CROWN.

*See* OFFICERS AND DEPARTMENTS OF STATE.

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## CLERK OF JUSTICIARY.

*See* JUSTICIARY, HIGH COURT OF.

## CLERK OF THE PEACE.

*See* JUSTICE OF THE PEACE.

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## CLERK OF SESSION.

*See* COURT OF SESSION.

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## CLERK OF TEINDS.

*See* TEINDS.

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## CLOSE TIME.

*See* FISHINGS; GAME LAWS.

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## CLOSING OF RECORD.

*See* PRACTICE AND PROCEDURE.

# CLUBS.

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### SECTION 1.—DEFINITION AND CLASSIFICATION.

**927.** A club is a voluntary association of a number of persons meeting together for purposes mainly social, each contributing a certain sum either to a common fund for the benefit of the members, or to a particular individual for his own benefit.<sup>1</sup> A club is not an association within the meaning of the Companies Act.<sup>2</sup>

**928.** Clubs are of two kinds—(1) Members' Clubs, where the members contribute to a common fund, and each has a share in the assets and property of the club; (2) Proprietary Clubs, where members' contributions are paid to a particular individual, who has control of the club, and to whom the club-house and property belong. All profits go to him, and he alone is responsible for all losses. The proprietor may be a limited company formed for the purpose of running the club.

**929.** The term has been improperly extended to three other classes of institutions: (1) Club Companies; (2) Registered Working Men's Clubs; and (3) Shop Clubs. The first class are really companies, and though the rules of law applicable to clubs as associations of individuals will apply to their internal affairs, other matters outside of these, such as debts and liabilities, are to be decided by the law relating to companies. The second, being associations registered under the Friendly Societies Acts, 1875 to 1908, are governed by the law laid down in these statutes. The third are regulated by the Shop Clubs Act, 1902.<sup>3</sup> They must be registered under the Friendly Societies Act, 1896,<sup>4</sup> and certified by the Registrar of Friendly Societies.

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GENERAL AUTHORITIES.—Wertheimer, *Law Relating to Clubs*, 4th ed.; Malone, *Club Law and the Law of Unregistered Friendly Societies*, 3rd ed.; Halsbury, *Laws of England*, vol. iv., *Working Men's Clubs*.

<sup>1</sup> Wertheimer, p. 4; *Hopkinson v. Marquis of Exeter*, 1867, L.R. 5 Eq. 63.

<sup>2</sup> *Re St James's Club*, 1852, 2 De G. M. & G. 383.

<sup>3</sup> 2 Edw. VII. c. 21.

<sup>4</sup> 59 & 60 Vict. c. 25.



## SECTION 2.—CONSTITUTION.

**930.** The position in law of a club is peculiar. It is an institution *sui generis*. A club *qua* club has no recognised position in law ; though a distinct entity, it is not a corporation, but an unincorporated society.<sup>1</sup> Further, neither as between the members themselves, nor in relation to third parties, is a club a partnership, the essential distinction being that the object of a club is not to acquire profit but to secure social intercourse or promotion of sport, science, arts, etc. This does not apply to proprietary clubs, the members of which use the property as licensees. Each club is constituted by its own set of rules, and these form the contract between the members. The constitution of the club and terms of membership cannot be altered except with the consent of all the members, unless there is express provision in the rules for such alteration. Thus it has been held that a club which is governed by rules prescribing the amount of the annual subscription, but not containing any provision for the amendment or alteration thereof, cannot, by a resolution passed by a majority of the members present at a general meeting, raise the amount of the subscription so as to bind existing members, and the Court will interfere to prevent the expulsion of a dissentient member for refusing to pay the increased subscription.<sup>2</sup> But, if made in accordance with the rules, an alteration is valid even if the effect is to discontinue one of the original purposes of the club.<sup>3</sup> The procedure laid down in the rules must be strictly observed, and if this is done the members are bound by the rules as altered.<sup>4</sup>

Usually a new member receives a copy of the rules when admitted, but this is not necessary. If the rules are accessible to the members, they are presumed to be acquainted with them,<sup>5</sup> and are bound by them.<sup>6</sup>

**931.** In general, a member may withdraw at any time, and, unless under the constitution acceptance of his resignation is required, a person ceases to be a member from the time his letter of resignation is received.<sup>7</sup> In order to become a member again, he will require to be re-elected. In most clubs there is, in addition to the usual officials, a committee of management. Such a committee, being the special and not the general agents of the club, can only do such acts as they are either expressly or by reasonable implication authorised to do.

<sup>1</sup> Per Day, J., *Steele v. Gourley*, 1886, 3 T.L.R. 119 and 772 (C.A.).

<sup>2</sup> *Harington v. Sendall and Ors.*, [1903] 1 Ch. 921.

<sup>3</sup> *Thellusson v. Valentia*, [1907] 2 Ch. 1.

<sup>4</sup> *Morgan v. Driscoll*, 1922, 38 T.L.R. 251 ; see *Watt v. M'Lachlan*, 1923, 1 Ir. R. 112 (alteration of rules regulating Sunday golf) ; *Young v. Ladies' Imperial Club*, [1920] 2 K.B. 523 ; *Yates v. Cyclists' Touring Club*, 1908, 24 T.L.R. 581.

<sup>5</sup> *Raggett v. Musgrave*, 1827, 2 C. & P. 556 ; *Alderson v. Clay*, 1816, 1 Stark, 405.

<sup>6</sup> *Lytleton v. Blackburne*, 1876, 45 L.J. Ch., p. 223 ; see *Innes v. Wylie*, 1844, 1 C. & K. 264.

<sup>7</sup> *Finch v. Oake*, [1896] 1 Ch. 409.

## SECTION 3.—PROPERTY.

**932.** In Proprietary Clubs the members are mere licensees, having, in return for their subscriptions, the use of the club-house and property in the manner prescribed by the rules. In Members' Clubs, so long as a person remains a member he has a joint interest in the property of the club, and this right cannot be defeated by a vote of the majority of the members. An alienation of the Club property, in opposition to the wish of the minority, has been held to be illegal, and will be prevented by the Court. But it is not *ultra vires* of the majority, or of the officials, to dispose of club property, provided such disposal be incidental to the club's proper administration.<sup>1</sup> In the case cited, a challenge cup had been presented for competition between certain curling clubs, who arranged that it should become the property of the club which should first win it two years in succession. The majority of the members of a club who so won it voted that it should be presented to the skip of their highest winning rink at the competition, but the Court held that this presentation was ineffectual, and granted a decree for delivery of the cup to the secretary as custodian.

## SECTION 4.—DISSOLUTION.

**933.** If the rules of a members' club contain no provision for its dissolution, it must be agreed to by all the members. Thus if the club has any assets, so that a dissolution affects patrimonial rights, the Court will sustain an action to prevent a resolution for dissolution, passed by the majority of the members, being carried out.<sup>2</sup> On the authority of an American case, it would appear that the Court will not interfere so as to grant any decree for dissolution unless it can be shewn that the association has ceased to carry out the purposes for which it was formed, and that the rules provide no other remedy.<sup>3</sup> On dissolution, the members at the time are entitled to an equal share of the assets, and any deficit should be apportioned among them, unless the rules provide otherwise.<sup>4</sup>

## SECTION 5.—HOW CLUBS MAY SUE AND BE SUED.

**934.** A club cannot sue or be sued in its own name alone.<sup>5</sup> Though the question has not been judicially settled in Scotland, Lord M'Laren, in the case cited, indicated an opinion that in most cases it would be a sufficient instance, if to the name of the club were added the names of its office-bearers. The safer course, however, and one which

<sup>1</sup> *Murray v. Johnston*, 1896, 4 S.L.T. 181; 33 S.L.R., 714.

<sup>2</sup> *Gardner and Ors. v. M'Lintock and Ors.*, 1904, 11 S.L.T. 654.

<sup>3</sup> *Lafond v. Deems*, 81 N.Y. 507.

<sup>4</sup> *Brown v. Dale*, 1878, 9 Ch. D. 78.

<sup>5</sup> *Renton Football Club v. M'Dowall*, 1891, 18 R. 670.

has been held to be competent, is for the club to sue along with a representation of its members duly authorised by a meeting of the club.<sup>1</sup> This course was adopted in the case of *Murray*.

Similarly, in suing a club, it is not necessary to call every individual member, but is enough if the club and its officials be called. If, however, the club were small and the names of the members easily ascertainable, it would be well to make them all parties to the action;<sup>2</sup> where action is raised in the Sheriff Court this is not necessary.<sup>3</sup>

The citation of a registered club is provided for by the Licensing (Scotland) Act, 1903.<sup>4</sup>

## SECTION 6.—LIABILITY OF MEMBERS IN CONTRACTS WITH THIRD PARTIES.

### SUBSECTION (1).—*Proprietary Clubs*.

**935.** The whole liability for contracts made or goods supplied on behalf of such a club rests upon the proprietor, such contracts being really made for his own purposes.<sup>5</sup> The secretary, steward, and committee will, *prima facie*, be assumed to be acting on his behalf.

### SUBSECTION (2).—*Members' Clubs*.

**936.** The question of the liability of members depends upon the law of principal and agent; for the law does not recognise a club of itself as a party to a contract, and the creditor must look to the person who gave the order, who will generally be an official or servant. In such cases the ordinary rules of agency apply. How far an official or a committeeman may bind the members of the club depends on the constitution of the club, to be found in its own rules.<sup>6</sup> In the usual case an ordinary member's liability does not extend beyond payment of his subscription and the price of meals, etc., taken at the club.<sup>7</sup> To make a member personally liable for goods supplied to the club, it would require to be shewn that he had in some way pledged his personal credit.<sup>8</sup> No member is liable except in so far as he has assented to the contract in respect of which such liability has arisen.<sup>9</sup> Thus it has been held that where there is no rule imposing liability, the members

<sup>1</sup> *Renton Football Club*, *supra*.

<sup>2</sup> *Renton Football Club*, *supra*; *Somerville v. Rowbotham*, 1862, 24 D. 1187; see also *Murdison v. Scottish Football Union*, 1896, 23 R. 449.

<sup>3</sup> *Sheriff Courts Act*, 1907. 7 Edw. VII. c. 51, First Schedule, Rules 11 and 15, as amended by *Sheriff Courts Act*, 1913, 2 and 3 Geo. V. c. 18.

<sup>4</sup> 3 Edw. VII. c. 25, s. 87.

<sup>5</sup> See *Allan*, 1894, 10 S.L.Rev. 296.

<sup>6</sup> *Fleming v. Hector*, 1835, 2 M. & W., per L. Abinger, C.B., at p. 179; *Andrews v. Alexander's Exr.*, 1869, L.R. 8 Eq. 176, per James, V.-C., at p. 195; *Hawke v. Cole*, 1890, 62 L.T. 658; *Draper v. Mannors*, 1892, 9 T.L.R. 73.

<sup>7</sup> *Steele v. Gourley*, 1886, 3 T.L.R. 119 and 772 (C.A.).

<sup>8</sup> *Overton v. Hewett*, 1886, 3 T.L.R. 246.

<sup>9</sup> *Re St James's Club*, 1852, 2 De G. M. & G. 383, per Lord St Leonard's.

of an ordinary club are not personally liable to indemnify the trustees of the club against liabilities incurred by them as such trustees.<sup>1</sup> In that case Lord Lindley said: "Clubs are associations of a peculiar nature. They are societies, the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society, or to anyone else, any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed, but understood by everyone, that clubs are formed; and this distinguishing feature has been often judicially recognised. It has been so recognised in actions by creditors and in winding-up proceedings." There may be cases where the facts shew that members have intervened in such a way as to render them liable for debts incurred by the club, or where, on the other hand, liability is expressly excluded under the rules. But the principle laid down by Lord Lindley has been affirmed in cases where there was no such express exclusion of liability.

**937.** The committee are the persons primarily liable, not *pro rata*, but with such relief as is obtainable from the club funds or voluntary contributions. The Committee have no authority to pledge the personal liability of members. But while an agent exceeding his authority is made personally liable, it does not follow that because a person is member of a committee which has gone beyond its functions, he is thereby made responsible. A committeeman would be personally liable for the price of goods ordered by the committee in a case where he took an active part in the management, or authorised, or acquiesced in, the orders given.<sup>2</sup> It would be sufficient to make the member of committee liable if, by the course of dealing or practice of the committee, he could be fixed with general knowledge of the debts that were being incurred. Thus it has been held that the individual members were not liable for supplies ordered by the clubmaster, but that the members of committee were jointly and severally liable, and decree was granted against a member of committee (who was a compearing defender) reserving any right of relief competent to him.<sup>3</sup> A member who, though nominated, has not accepted nomination nor acted as a member of Committee, will not be liable for goods supplied to the club.<sup>4</sup>

**938.** Committeemen exceeding their authority may escape personal liability if the club subsequently homologate their action.<sup>5</sup> A member cannot, by resigning, escape liability that has arisen during his

<sup>1</sup> *Wise v. Perpetual Trustee Co.*, [1903] A.C. 139.

<sup>2</sup> *Steele v. Gourley*, *supra*; *Todd v. Emly*, 1841, 7 M. & W. 427; 8 M. & W. 505; *Stansfield v. Ridout*, 1889, 5 T.L.R. 656.

<sup>3</sup> *Thomson & Gillespie v. Victoria Eighty Club*, 1905, 13 S.L.T. 399 (O.H.).

<sup>4</sup> *Fleming v. Hector*, *supra*.

<sup>5</sup> *Minnitt v. Talbot*, 1876, 1 L.R. Ir. Ch. D. 143.



membership,<sup>1</sup> but he is not liable for contracts made after his resignation.<sup>2</sup>

### SECTION 7.—EXPULSION OF MEMBERS.

#### SUBSECTION (1).—*Jurisdiction of Courts of Law.*

**939.** No action lies at the instance of a member of a voluntary association to enforce his right to membership, unless he can shew patrimonial loss or invasion of some civil right.<sup>3</sup> “The foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion.”<sup>4</sup> In a members’ club the payment of a subscription which goes to form a common fund belonging to the members jointly may be a sufficient right of property to give the Courts jurisdiction, the test being that the members are entitled, on the club’s dissolution, to an equal share in its assets. In a proprietary club, on the other hand, where the members have no right of property, but merely a right to use the club premises on payment of a subscription, the Court will not interfere, although the expulsion may have been irregularly carried out; but the expelled member may have his remedy in damages for breach of contract.<sup>5</sup>

#### SUBSECTION (2).—*How the Power of Expulsion is to be Exercised.*

**940.** The power of expulsion must be exercised in accordance with the rules<sup>6</sup> and in good faith.<sup>7</sup> The member ought to have notice of the reason for proposing to expel him,<sup>8</sup> and an opportunity of defending himself.<sup>9</sup> If there be no provision in the rules, the expulsion may be carried out by a vote of the members, provided due notice be given to the member proposed to be expelled.<sup>10</sup> In most clubs the power of expulsion is, under the rules, vested in the committee. The Court does not act as a Court of Appeal from such committees. The members are

<sup>1</sup> *Parr v. Bradbury*, 1885, 1 T.L.R. 285 and 525.

<sup>2</sup> Per James, V.-C., *In re London Marine Association*, 1869, L.R. 8 Eq. 195.

<sup>3</sup> *Aitken v. Associated Carpenters and Joiners of Scotland*, 1885, 12 R. 1206, per L. P. Inglis, 1212; see also *M’Millan v. Free Church*, 1861, 23 D. 1314, per Lord Deas, at 1346; *Forbes v. Eden*, 1867, L.R. 1 Sc. Ap. 568; per Lord Cranworth, 581; and 4 M. 143, per L. J.-C. Inglis, 157, per Lord Cowan, 163; *Murdison v. Scottish Football Union*, 1896, 23 R. 449.

<sup>4</sup> Per Sir George Jessel, M.R., in *Rigby v. Connol*, 1880, 14 Ch. D. 482, followed in *Chamberlain’s Wharf, Ltd. v. Smith*, [1900] 2 Ch. 605; see also *Thomson v. British Medical Association, N.S.W. Branch*, [1924] A.C. 764.

<sup>5</sup> *Baird v. Wells*, 1890, 44 Ch. D. 661, 59 L.J. Ch. 673; *Lyttleton v. Blackburne*, 1876, 45 L.J. Ch. 223; *Kelly v. National Society of Operative Printers*, 1915, 31 T.L.R. 632; *Braithwaite v. Amalgamated Society of Carpenters*, [1921] 2 Ch. 399.

<sup>6</sup> *Wood v. Wood*, 1874, L.R. 9 Ex. 190, at p. 196; *Russell v. Russell*, 1880, 14 Ch. D. 471; *Young v. Ladies’ Imperial Club, Ltd.*, [1920] 2 K.B. 523.

<sup>7</sup> *Tantussi v. Molli*, 1886, 2 T.L.R. 731.

<sup>8</sup> *Labouchere v. Wharnccliffe*, 1879, 13 Ch. D. 346; *James v. Chartered Accountants’ Institute*, 1907, 98 L.T. 725 (where member neglected to notify his change of address).

<sup>9</sup> *Fisher v. Keane*, 1878, 1 Ch. D. 353; *Gray v. Allison*, 1909, 25 T.L.R. 531; *D’Arcy v. Adamson*, 1913, 29 T.L.R. 367.

<sup>10</sup> *Innes v. Wylie*, 1844, 1 C. & K., per Lord Denman, C.J., 264.

generally the best judges of what is injurious to the interests of the club, and the Court will therefore be slow to interfere with the discretion of the committee. Where a member was suspended after inquiry, and the chairman of the committee was the informant, it was held that the presence of the chairman at the meeting did not vitiate the proceedings.<sup>1</sup> A Court of law, provided there be sufficient grounds to warrant the exercise of its jurisdiction, will only interfere so as to reinstate an expelled member—

(1) Where anything has been done which, though within the rules of a club, is contrary to natural justice.

(2) Where the expulsion has not been carried out according to the rules of the club.

(3) Where, though within the rules, the proceedings were not *bona fide*, but fraudulent and malicious; an unreasonable decision being strong evidence of malice.<sup>2</sup>

#### SECTION 8.—LIABILITY FOR WRONG OR TORT.

**941.** The ordinary rules with regard to the liability of a master for the actings of his agent or servant are applicable. Thus the proprietor of a proprietary club has been held liable for a member's jewellery stolen by a dishonest servant.<sup>3</sup> The proprietor of a club is liable for any nuisance caused in carrying on a club.<sup>4</sup>

**942.** A golf club has been held jointly liable in damages with one of its members who hit a ball from the tee on to a public road and injured a person on the eye. The hole was placed parallel with the road from the tee, and there was proved knowledge of the committee or directors that balls often dropped on the road.<sup>5</sup> It has to be noted that there it was a case of a private club creating a public nuisance. In a recent Scottish case the final judgment on the merits (in favour of the defenders) in an appeal to the Inner House was not reported, and the only report is on the relevancy.<sup>6</sup> In that case the links were dedicated under statutory authority to the game of golf, and the pathway where the person was struck by a golf ball was part of the links. The question has not been decided whether the principle of the *St Augustine's* case would apply where links have been used for golf from time immemorial, and the line of a hole formerly safe has become dangerous to the public, through the extension of feuing alongside the links and the formation outside the links of a new public road. The failure, if it were possible,

<sup>1</sup> *Anderson v. Manson and Ors.*, 1908, 16 S.L.T. 281.

<sup>2</sup> *Baird v. Wells*, *supra*; *Dawkins v. Antrobus*, 1881, 17 Ch. D. 615; 44 L.T. 557; *Labouchere v. Wharnccliffe*, *supra*; *Hopkinson v. Marquis of Exeter*, 1867, L.R. 5 Eq. 63; 37 L.J. Ch. 173; *Lambert v. Addison*, 1882, 46 L.T. 20. Cf. also *Cassel v. Inglis*, [1916] 2 Ch. 211; *Weinberger v. Inglis* (No. 2), [1918] 1 Ch. 517.

<sup>3</sup> *Williams v. Carzon Syndicate, Ltd.*, 1919, 35 T.L.R. 475 (C.A.)

<sup>4</sup> *Bellamy v. Wells*, 1890, 60 L.J. Ch. 156; 63 L.T. 635.

<sup>5</sup> *Castle v. St Augustine's Links, Ltd.*, 1922, 38 T.L.R. 615.

<sup>6</sup> *M'Leod v. Provost, Magistrates, and Town Council of St Andrews*, 1924 S.C. 960; 1924 S.L.T. 712.

to divert the line of a hole so as to remove an obvious and known danger created by increased feuing might not unreasonably be held to be negligence on the part of the authorities concerned.

The committee of a football club have been held personally responsible for injuries to one of the public through the collapse of a stand for the accommodation of visitors.<sup>1</sup>

**943.** Where the committee of a football union passed and published in the newspaper press a resolution that a certain player be suspended from playing until the suspension was withdrawn, such action of the committee, while it might support an issue for defamation, would not give the player a claim for damages for tort or legal wrong unless he could shew patrimonial loss. Where no patrimonial loss was averred,<sup>2</sup> the fact that he was prevented from taking part in football matches with affiliated clubs was held not to be an invasion of any legal right.

### SECTION 9.—LICENSING LAWS.

#### SUBSECTION (1).—*Prior to Licensing Act, 1921.*

**944.** The Licensing Act, 1921,<sup>3</sup> has introduced restrictions in regard to the supply and consumption of intoxicating liquors in clubs that are inconsistent with, and therefore must be held to have altered to a large extent, the law relating to clubs in this respect. As the provisions of this Act especially in regard to clubs appear in some respects to be of doubtful interpretation, it may be convenient and useful to state what the law was before the Act of 1921 came into operation.

**945.** The important proposition in this connection is that the Licensing Acts did not apply to members' clubs, or, in other words, a "sale" of spirits as between the club and a member was not a "sale" within the meaning of the Licensing Acts, making it necessary for the club to have an Excise licence to retail spirits.<sup>4</sup> This exemption extended to club companies.<sup>5</sup> This would only appear to apply where every shareholder of the company was a member of the club. On the other hand, it was not thought to be necessary that every member of the club should be a shareholder of the club.<sup>6</sup> But the club must be a *bona fide* and not a bogus one. Though originally the club may have been a *bona fide* one, such character may be lost by the system of admission practised, in habitual disregard of the rules.<sup>7</sup>

<sup>1</sup> *Brown v. Lewis*, 1896, 12 T.L.R. 455.

<sup>2</sup> *Murdison v. Scottish Football Union*, 1896, 23 R. 449; see also *Robinson v. Scottish Amateur Athletic Association*, 1900, 7 S.L.T. 356 (O.H.); *Blasquez v. Lothians Racing Club*, 1889, 16 R. 893.

<sup>3</sup> 11 & 12 Geo. V. c. 42.

<sup>4</sup> *Graff v. Evans*, 1882, 8 Q.B.D. 373; *Metford v. Edwards*, [1915] 1 K.B. 172.

<sup>5</sup> *Newell v. Hemingway*, 1888, 5 T.L.R. 93; 60 L.T. 544.

<sup>6</sup> *National Sporting Club v. Cope*, 1900, 16 T.L.R. 158; see *Bowyer v. Percy Supper Club, Ltd.*, [1893] 2 Q.B. 154.

<sup>7</sup> *Madin v. M'Lean*, 1894, 21 R. (J.C.) 40, 1 Adam, 376; see also *Evans v. Hemingway*, 1887, 52 J.P. 134.

SUBSECTION (2).—*Effect of the Licensing Act, 1921.*

**946.** During the War stringent restrictions under the Emergency Legislation Regulations were placed upon the sale and supply of intoxicating liquors, and for this purpose clubs were brought into line with licensed premises. Most of these restrictions have been repealed by the Licensing Act, 1921, which, however, re-enacted a number of the restrictions introduced during the War. The principal restriction is that intoxicating liquors can only be sold, supplied, and consumed, with certain exemptions, during "permitted hours." Within the limits of the statute clubs (*i.e.* registered clubs) can fix their own "permitted hours," with the addition of one hour in the evening; but otherwise the provisions of the Act are equally binding on them as on licensed premises. Members residing for the time in the club are not affected by these restrictions. Whether this privilege is extended to a *bona fide* guest of the resident member is not clear.

## SECTION 10.—REGISTRATION.

**947.** Though clubs do not require a licence, the Licensing (Scotland) Act, 1903,<sup>1</sup> makes it necessary for them to comply with certain regulations, if exciseable liquors are supplied or sold to the members. These regulations are to be found in Part V. of the Act, ss. 77 to 90. All clubs which supply exciseable liquor require to be registered. The register is kept by the Sheriff-Clerk. Section 78 provides the mode in which the application for registration and for renewal is to be made by the secretary. This section has been amended by s. 8 (1) of the Temperance (Scotland) Act, 1913,<sup>2</sup> which must be read in conjunction with it.

**948.** A club is not eligible for registration unless its rules contain certain provisions. These provisions are set forth in s. 80 of the 1903 Act as amended by the 1921 Act, and are as follows:—

- (a) that the business and affairs of the club shall be under the management of a committee or governing body, elected for not less than a year by the general body of members and subject in whole or in a specified proportion to annual re-election, and that no member of the committee or governing body and no manager or servant employed in the club shall have any personal interest in the sale of exciseable liquors therein or in the profits arising from such sale;
- (b) that the committee or governing body shall hold periodical meetings;
- (c) that the names and addresses of persons proposed as ordinary members of the club shall be displayed on a conspicuous place in the club premises for at least a week before their election,

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<sup>1</sup> 3 Edw. VII. c. 25.

<sup>2</sup> 3 & 4 Geo. V. c. 33.



and that an interval of not less than two weeks shall elapse between nomination and election of ordinary members.

- (d) that all members shall be elected by the whole body of members or by the committee or governing body, with or without specially added members;
- (e) that there shall be a defined subscription payable by members in advance;
- (f) that correct accounts and books shall be kept shewing the financial affairs and intromissions of the club;
- (g) that a visitor shall not be supplied with exciseable liquor in the club premises unless on the invitation and in the company of a member, and that the member shall, upon the admission of such visitor to the club premises or immediately upon his being supplied with such liquor, enter his own name and the name and address of the visitor in a book which shall be kept for the purpose, and which shall shew the date of each visit;
- (h) that no exciseable liquors shall be sold or supplied for consumption outside the premises of the club except to a member on the premises and for his own consumption, or to a person holding an excise licence for the sale of such liquor (s. 84);
- (i) that no persons shall be allowed to become honorary or temporary members of the club or be relieved of the payment of the regular entrance fee or subscription, except those possessing certain qualifications defined in the rules, and subject to conditions and regulations prescribed therein;
- (j) that no person under eighteen years of age shall be admitted a member of the club unless the club is one primarily devoted to some athletic purpose, and, in the latter case, that no exciseable liquors shall be sold or supplied to any person under eighteen years of age.

In addition to these a further provision is required, viz. :—

- (k) a statement of the permitted hours applicable to the club.<sup>1</sup>

**949.** There is a proviso exempting from the operation of this section any lodge of Freemasons duly constituted under a charter from the Grand Lodge of Scotland, and exempting from subsections (c), (d), and (j) a University Students' Union, which is recognised and certified as such to the registrar by the *Senatus Academicus*. The registrar has to give notice of the application for registration to the chief officer of police, and if within a burgh, to the town council, and if not within a burgh, to the parish council (s. 79). Any of these may lodge objections. Objections may also be lodged by the procurator fiscal, and any person, or the agent of any person owning or occupying property in the neighbourhood of the club: but there is no provision for these receiving notice from the registrar.<sup>2</sup> A copy of objections must be intimated by objectors to the secretary of the club. If no objections

<sup>1</sup> Licensing Act, 1921 (11 & 12 Geo. V. c. 42), s. 21 (1) g.

<sup>2</sup> 3 & 4 Geo. V. c. 33, s. 8 (2); see *Peeblesshire Social Club*, 1922, S.L.T. (Sh. Ct.) 75.

are made, the sheriff, if satisfied that the application has been duly made, and that the rules of the club are in conformity with the provisions of the Act, grants the application.

The sheriff, if objections are lodged, will hear the parties, and may order inquiry. He shall then grant or refuse the application, and has power to award expenses against the unsuccessful party.

**950.** The objections must be taken upon one or more of the following grounds (s. 81):—

- (a) that the application made by the club, or its rules, or any of them, are in any respect specified in such objection not in conformity with the provisions of the Act,<sup>1</sup> or
- (b) that the club has ceased to exist or that the number of members is less than twenty-five; or
- (c) that it is not conducted in good faith as a club, or that it is kept or habitually used for any unlawful purpose, or mainly for the supply of exciseable liquor; or
- (d) that there is frequent drunkenness on the club premises or that persons in a state of intoxication are frequently seen to leave the club premises or that the club is conducted in a disorderly manner; or
- (e) that illegal sales of exciseable liquor have taken place on the club premises; or
- (f) that persons who are not members are habitually admitted to the club merely for the purpose of obtaining exciseable liquor; or
- (g) that the club occupies premises in respect of which, within twelve months next preceding the formation of the club, a certificate for the sale of exciseable liquors has been forfeited or the renewal of such a certificate has been refused, or in respect of which an order has been made that they shall not be used for the purposes of a club; or
- (h) that the supply of exciseable liquor to the club is not under the control of the members or the committee appointed by the members; or
- (i) that any of the rules of the club are habitually broken; or
- (j) that the rules have been so changed as not to be in conformity with the provisions of section 80 of the Act.

**951.** The Temperance (Scotland) Act, 1913, amended this section by the addition of further grounds of objection. These, which to some extent overlap the provisions of the 1903 Act, are contained in s. 8, subs. 4 of the 1913 Act, and are as follows:—

- (a) That the premises are, or the situation thereof is, not suitable or convenient for the purpose of a club; or that there is a drinking-bar or other part of the premises mainly or exclusively used for the consumption of exciseable liquors; or

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<sup>1</sup> See *Wellington Athletic Club v. Magistrates of Leith*, 1904, 12 S.L.T. 570.

- (b) that the club is to be used mainly as a drinking club; or
- (c) that the owner of the premises, when the same are not owned by the club or the immediate lessor of the premises, or the officials and committee of management, or governing body, or the manager, or a servant employed in or by the club, have, or has, or will have a personal interest in the purchase by the club, or in the sale in the club of exciseable liquors, or in the profits arising therefrom; or
- (d) that persons are habitually admitted or supplied as members without an interval of at least two weeks between their nomination and election as ordinary members or for a subscription of a merely nominal amount; or
- (e) that the officials and committee of management or governing body or the members are persons of bad character or who follow no lawful occupation and have no means of subsistence; or
- (f) that the club has been or will be used as the resort of criminals or persons of bad character; or
- (g) that men or women of bad fame assemble in or frequent the club; or
- (h) that exciseable liquors are sold or supplied for consumption on or off the premises between the hours of two in the morning and ten in the morning.<sup>1</sup>

**952.** Power is given to a justice of the peace or magistrate of any burgh in certain circumstances to grant a search warrant, which will authorise the constable to enter the club, inspect the premises, take the names and addresses of persons found therein, and seize any books and papers relating to the business of the club (1903 Act, s. 82).

It is an offence to supply or sell, or to keep exciseable liquor in an unregistered club (s. 83). It has to be noted that if exciseable liquor is kept for supply or sale in an unregistered club, every officer and every member of the club is liable to a penalty. It is also an offence to sell or supply exciseable liquor in a registered club for consumption outside the premises except to a member on the premises and for his own consumption, or to a person holding an Excise licence for the sale of such liquor (s. 84). Where there has been a conviction under s. 84, or where the sheriff, and also, in a burgh, any magistrate, has pronounced a finding that a registered club is being so managed or carried on as to constitute a ground of objection to the renewal of its certificate, the sheriff may, after inquiry, if thought necessary, cancel the certificate.

**953.** Penalties are imposed on the officials and members where a club is not properly conducted, as follows:—

Where a finding has been pronounced that a registered club is being so managed or carried on as to constitute a ground of objection to the renewal of its certificate, then, if the following grounds, or any of them, are specified in such finding, *videlicet*:—

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<sup>1</sup> But see Licensing Act, 1921, ss. 1 to 3.

- (1) that it is not conducted in good faith as a club, or that it is kept or habitually used for any unlawful purpose, or mainly for the supply of exciseable liquor; or
- (2) that there is frequent drunkenness on the club premises, or that persons in a state of intoxication are frequently seen to leave the club premises, or that the club is conducted in a disorderly manner; or
- (3) that persons who are not members are habitually admitted to the club merely for the purpose of obtaining exciseable liquor—

every person entered in the register of clubs as an official or a member of the committee of management or governing body of the club shall, unless he satisfies the Court that the club was so managed or carried on without his knowledge or against his consent, be liable, on summary conviction, to a penalty not exceeding for a first offence seven pounds, for a second offence, whether in connection with the same or another club, fifteen pounds, and for a third or subsequent offence as aforesaid thirty pounds (s. 86).

The decision of the Sheriff is final, and his jurisdiction is not excluded by being a member of any club (s. 88).

A secretary will be penalised for knowingly making a false application (s. 89).

## SECTION 11.—TAXATION.

### (i) *Income Tax.*

**954.** A proprietary club or a club run by a limited liability company is liable to income tax on all its profits. A members' club whose income arises solely out of payments by the members is not taxable upon its profits. Questions may arise as to whether and to what extent a club can be said to be carrying on a business. Thus a golf club has been held liable to assessment for income tax in respect of visitors' green fees.<sup>1</sup> In that case the club had a special arrangement with the railway company from whom the links were leased that the public were to be admitted to play on payment of green fees. The income tax authorities do not now assess upon green fees paid by persons who under the rules of the club are admitted to temporary membership.

### (ii) *Entertainment Tax.*

**955.** Where members of a club are admitted to the club ground without any payment beyond their subscription, and the general public have to pay for admission to witness a match such as at cricket or football, it has been held that part of the subscription is liable to entertainment tax.<sup>2</sup>

<sup>1</sup> *Carlisle and Silloth Golf Club v. Smith*, 1913, 82 L.J. K.B. 337; see also *Re Surrey County Cricket Club*, [1901] 2 K.B. 400.

<sup>2</sup> *Att. Gen. v. Swan*, [1922] 1 K.B. 682.



# COAL MINES.

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## SECTION I.—INTRODUCTORY.

### SUBSECTION (1).—Statutory Provisions.

956. The law relating to coal mines is statutory and of comparatively recent date. Before 1911 it was contained in a number of statutes, which amended or extended the Coal Mines Regulation Act, 1887, and whose objects, briefly, were to restrict the employment of young persons,

particularly underground, to safeguard the interests of workmen with respect to payment of wages, and to provide more effective means for the safety of those employed in the mines. The appointment of a Royal Commission on Mines in 1906, however, resulted in a codification of the law, by the Coal Mines Act, 1911,<sup>1</sup> which repealed previous legislation on the subject, with the exception of certain provisions,<sup>2</sup> which dealt with the weighing of minerals and the appointment of check-weighers, and the Coal Mines Regulation Act, 1908,<sup>3</sup> which limited hours of work below ground to eight hours a day.

957. The Act of 1911 has been amended by the Coal Mines Act, 1914,<sup>4</sup> and a minimum wage has been established for coal miners by the Coal Mines (Minimum Wage) Act, 1912,<sup>5</sup> which was originally limited in duration to three years, but is now annually renewed under the annual Expiring Laws Continuance Act. The limitations on the hours of work below ground have since been modified by the Coal Mines Regulation (Amendment) Act, 1917,<sup>6</sup> the Coal Mines Act, 1919,<sup>7</sup> and the Coal Mines Act, 1926,<sup>8</sup> and further restrictions on employment have been imposed by the Employment of Women, Young Persons, and Children Act, 1920.<sup>9</sup> The general administration and organisation of the coal mining industry have also been provided for by the Mining Industry Act, 1920,<sup>10</sup> and the Mining Industry Act, 1926.<sup>11</sup> In the following sections the references, except where otherwise noted, are to the sections of the principal Act, viz.<sup>1</sup> the Coal Mines Act, 1911. The other Acts will be referred to by their dates, with the exception of the two Acts of 1926, which will be referred to by their titles. It is to be noted also that decisions prior to 1st July 1912 proceeded upon the corresponding provisions in the repealed Acts, and not upon the terms of the Act of 1911.

#### SUBSECTION (2).—*General Regulations.*

958. A very large part of the statutory rules applicable to coal mines is contained not in the Act itself but in the Orders and General Regulations issued under the Act. These are re-issued annually, and are given the authority of statute by s. 86 of the Act. These regulations therefore become, for the purpose of obedience or disobedience, provisions of the Act itself.<sup>12</sup> Regulations so made are numerous, and it is important to notice that such regulations may vary or amend any of the provisions contained in Part II. of the Act—which deals with provisions as to safety—and of the Third Schedule—dealing with the care and treatment of horses and other animals.

<sup>1</sup> 1 & 2 Geo. V. c. 50.

<sup>2</sup> 50 & 51 Vict. c. 58, ss. 12 to 15; Coal Mines (Check Weigher) Act, 1894 (57 & 58 Vict. c. 52); Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. VII. c. 9).

<sup>3</sup> 8 Edw. VII. c. 57.

<sup>4</sup> 4 & 5 Geo. V. c. 22.

<sup>5</sup> 2 Geo. V. c. 2.

<sup>6</sup> 7 Geo. V. c. 8.

<sup>7</sup> 9 & 10 Geo. V. c. 48.

<sup>8</sup> 16 & 17 Geo. V. c. 17.

<sup>9</sup> 10 & 11 Geo. V. c. 65.

<sup>10</sup> 10 & 11 Geo. V. c. 50.

<sup>11</sup> 16 & 17 Geo. V. c. 28.

<sup>12</sup> *Willingale v. Norris*, [1909] 1 K.B. 57.

959. In the present article it is intended to summarise the provisions of the Act, and merely to indicate briefly the matters dealt with by the General Regulations, to which reference should be made for their details. The statutory Rules and Orders made under the Act are contained in a volume, published for the Mines Department by H.M. Stationery Office under the title "Regulations and Orders Relating to Mines under the Coal Mines Act, 1911," and containing Orders up to 31st December preceding publication.

## SECTION 2.—ADMINISTRATION AND ORGANISATION OF THE MINING INDUSTRY.

### SUBSECTION (1).—*Mines Department.*

960. By the Act of 1920 there was established the Mines Department of the Board of Trade, under the Secretary for Mines, by whom all powers and duties of the Board of Trade in relation to the mining industry were thenceforth to be exercised. The Mines Department is charged with the duty of securing the most effective development and utilisation of the mineral resources of the United Kingdom, and the safety and welfare of those engaged in the mining industry, and for that purpose there were transferred to the Board of Trade, as from 6th December 1920, all the powers of a Secretary of State under enactments relating to mines and quarries (1920 Act, ss. 1 and 2).

961. The Mines Department undertakes the collection and publication of information and statistics relating to the mining industry, and co-operates with other Government departments in the initiation and direction of research in connection therewith. The 1920 Act empowers the Board of Trade to appoint Advisory Committees in matters connected with their powers and duties under the Act (1920 Act, s. 4). The Board may also make or adopt schemes with respect to the drainage of any group of mines, and any such scheme may amend or repeal any local Act of Parliament in connection with such drainage (1920 Act, s. 18). The Board can require mineowners and other persons engaged in the mining industry to furnish them with such statistics, returns, plans, and other information as they may require, but no information with respect to any particular undertaking may be included in any published report except with the consent of the owner (1920 Act, s. 21). The Board may also hold such inquiries as they consider desirable for the purposes of the Act (1920 Act, s. 22).

### SUBSECTION (2).—*Pit and District Committees and Joint Committees.*

962. Under the Second Schedule to the Act of 1920 the United Kingdom was divided up into twenty-six coal districts and seven coal areas. The Act contemplated the establishment of a pit committee for every mine in which a resolution in favour thereof had been passed by a majority of the workers, and the constitution of district committees in

each district, area boards in each coal area, and a national board. The pit committees were to discuss and make recommendations regarding the safety, health, and welfare of the workers, the maintenance and increase of output, inspection reports, disputes (including disputes as to wages), and any other matters prescribed by regulations. Matters might be referred by a pit committee to the district committee, and so through the area board to the national board. The Board of Trade were empowered to require "compliance with any recommendations referred to them." The whole scheme, however, fell through owing to the failure of those entitled to appoint representatives. A report to that effect was laid before Parliament, which took no further action, and the provisions of the Act therefore ceased to have effect (1920 Act, ss. 7 to 17).

963. Provision has, however, been made by the Mining Industry Act, 1926, for the establishment of machinery for mutual discussion regarding matters of common interest in regard to the working of mines between representatives of the management and representatives of the workers. If at any time after two years from the commencement of the Act the Board are satisfied that no adequate opportunity has been afforded by the owner or manager for the establishment of such machinery in any mine other than a "small mine," the Board may make regulations providing for the constitution of a Joint Committee consisting of representatives of the owners and management and representatives of the workers. The functions of the Joint Committee are to be such as may be prescribed by the regulations, but are not to include any powers in relation to the control or management of the mine. The representatives of the workers must be selected by ballot from among their own number. (Mining Industry Act, 1926, s. 21.)

#### SUBSECTION (3).—*Welfare Fund.*

964. The Act of 1920 established a fund for the improvement of the social conditions of colliery workers, and for mining education and research, which was to be built up out of annual contributions by the owners of every coal mine of one penny a ton of the output for each year up to 31st March 1926. The duration of the Act has, however, now been extended to 31st March 1931 by the Mining Industry (Welfare Fund) Act, 1925.<sup>1</sup> The allocation of the fund is entrusted to a committee of seven (now known as the Miners' Welfare Committee) appointed by the Board of Trade, of whom two are to be appointed after consultation with the Mining Association, and two after consultation with the Miners' Federation. Provision was made that four-fifths of the contributions from coal mines in any district were to be allocated to that district, and that in no case should any grant be made from the fund for the building or repairing of dwelling-houses. The Act contemplated that money

<sup>1</sup> 15 & 16 Geo. V. c. 80.



might be allocated from the fund for the purpose of providing facilities for the workmen taking baths and drying clothes, in which case the provisions of the 1911 Act on that subject were to apply (1920 Act, s. 20).

965. Since 31st March 1926 there has been added a levy, called the "royalties welfare levy," upon every person liable to pay mineral rights duty on the rental value of rights to work coal, and of mineral wayleaves in connection with coal, amounting to one shilling per pound of the rental. The levy is to be collected with the mineral rights duty, and paid over to the Miners' Welfare Committee. The Committee, whose numbers are to be increased by two, one representing the Miners' Federation and one representing royalty owners, are not bound, as in the case of the original welfare fund, to allocate any part of the royalties welfare levy to any particular district; and it is now the duty of the Committee to secure as far as reasonably practicable the provision at all coal mines of facilities for baths and drying clothes.<sup>1</sup>

#### SUBSECTION (4).—*Amalgamation Schemes and Profit-sharing Schemes.*

966. Where the owners of two or more undertakings consisting of or comprising coal mines agree to amalgamate their undertakings in order to effect economies in the working or disposal of coal, power is given to them by the Mining Industry Act, 1926, to submit an amalgamation scheme to the Board of Trade. Also where the owners of any such undertaking consider that economies could be effected if they were given power to absorb another undertaking, whose owners will not agree to amalgamate, they may submit a scheme for the absorption of that undertaking in their own. An amalgamation or absorption may be partial as well as total, but no partial absorption scheme may provide for the separation of the treating or disposal of coal from the working thereof; nor, in the case of an undertaking whose primary object is not coal mining, may such a scheme separate the working of a coal mine from the rest of the undertaking.

967. The Board of Trade are to consider such schemes as may be submitted to them, and if satisfied that a *prima facie* case has been made out that economies would be effected, they are to refer the matter to the Railway and Canal Commission. The latter, after hearing objections, may confirm the scheme, with or without modification, if satisfied that it would be in the national interest to do so, and that the terms of the scheme are fair and equitable to all concerned, or they may refuse to confirm it. As the tendency of the Act is to favour amalgamations, the Court will adopt a benevolent attitude towards such applications.<sup>2</sup> The Commissioners, however, in cases in which they consider that a holder of securities in an original company would not be fairly

<sup>1</sup> Mining Industry Act, 1926, ss. 14 to 17 (16 & 17 Geo. V. c. 28).

<sup>2</sup> *In re Denaby and Cateby Main Colliery, Ltd., and Ors.*, Times newspaper, 4th March 1927.

treated by receiving instead securities in the new amalgamated company, may order that his existing securities shall be purchased at a price to be determined as they may direct.<sup>1</sup> Approved schemes, even if unopposed, are exempted from payment of stamp duty.<sup>2</sup>

968. The Act also permits any company, notwithstanding anything contained in its memorandum or articles of association, to establish and carry out profit-sharing schemes conceived in the interests of its employees.<sup>3</sup>

SUBSECTION (5).—*Working Facilities and Facilities for Research.*

969. Anyone who wishes to search for and work coal may make an application to that effect to the Railway and Canal Commission, who may grant the right if they consider it expedient in the national interest. The national interest may vary from time to time, and the Court has not attempted an exhaustive definition. In any event, however, the following matters will be considered:—(1) the safety of the men who would have to work the coal; (2) by what means the largest amount of coal could be obtained; (3) economic, expeditious, and efficient working; (4) the number of men to be employed; and (5) where there is an application to let down surface, the comparative values of the minerals to be gotten, and of the buildings on the surface.<sup>4</sup> The application is made under Part I. of the Mines (Working Facilities and Support) Act, 1923,<sup>5</sup> but the restriction there contained—viz. that the applicant must have an interest in the minerals proposed to be worked—is now removed.

970. Similarly, where the working of any coal in the most efficient and economical manner is prevented by restrictions contained in any mining lease, the Railway and Canal Commission may, upon application being made to them, remove either wholly or partially such restrictions, if they consider it expedient in the national interest that that should be done.<sup>6</sup>

971. The Act also provides that where any shafts or boreholes are sunk to a depth of more than 100 feet for the purpose of searching for or getting minerals, notice must be given to the Committee of the Privy Council for Scientific and Industrial Research, so that the Committee may have access to the shaft or borehole, and may inspect the journals directed to be kept, and inspect and take samples of the specimens of strata encountered. The owners and managers of every mine must also allow the Committee and their officers access at all reasonable times to all underground workings, and must supply them with such information and specimens as they may require.<sup>7</sup>

<sup>1</sup> 16 & 17 Geo. V. c. 28, ss. 1 to 12.

<sup>2</sup> *In re Denaby and Cadeby Main Colliery, Ltd., and Ors.*, Times newspaper, 4th March 1927.

<sup>3</sup> 16 & 17 Geo. V. c. 28, s. 20.

<sup>4</sup> *In re J. & J. Charlesworth, Ltd., and Henry Briggs, Son & Co., Ltd.*, 1926, 43 T.L.R. 100.

<sup>5</sup> 13 & 14 Geo. V. c. 20.

<sup>6</sup> Mining Industry Act, 1926, s. 13.

<sup>7</sup> *Ibid.*, s. 23.

SUBSECTION (6).—*Recruitment.*

**972.** For the purpose of securing that in the recruitment of persons over the age of eighteen for employment in the coal-mining industry preference shall be given to those who were so employed immediately before 30th April 1926 (when the coal strike started), or who were so employed when last in regular employment, the Mining Industry Act, 1926, gives the Minister of Labour power to make regulations designed to secure that result, after consultation with associations representing respectively employers and workmen. The section applies to any employment in or about a coal mine in the getting, handling, hauling, preparation, and despatch of coal, and is to continue in force only until 31st December 1929 unless Parliament otherwise determines. The regulations must be laid before each House of Parliament when made, and may be annulled upon presentation of an Address to His Majesty by either House within twenty sederunt days thereafter. Penalties are enacted for breach of the regulations, and for false statements or representations made for the purpose of obtaining employment.<sup>1</sup>

## SECTION 3.—APPLICATION OF COAL MINES ACT, 1911.

**973.** The Act applies to mines of coal, stratified ironstone, shale, and fireclay (s. 1). All other mines are subject to the Metalliferous Mines Regulation Acts, 1872 and 1875.<sup>2</sup> If any question arises (except in legal proceedings) as to whether a mine is a mine to which the Act applies, that question is to be determined by the Secretary of State (s. 113).

**974.** Under the interpretation section (s. 122) "mine" includes every shaft in the course of being sunk, and every level and inclined plane in the course of being driven, and all the shafts, levels, planes, works, tramways, and sidings, both below ground and above ground, in and adjacent to and belonging to the mine. A place on a private branch line leading to the colliery, and 800 yards from the mine, has been held (in a decision under the Workmen's Compensation Act) to be "adjacent and belonging" to the mine.<sup>3</sup> "Mine," however, does not include any part of such premises on which any manufacturing process is carried on, other than a process ancillary to the getting, dressing, or preparation for sale of minerals. Two workings with a common system of ventilation and drainage, and with the barrier between them pierced so as to admit of through haulage, and both under the control of a single manager, form a single mine.<sup>4</sup> Where, however, two underground workings had separate shafts, ventilation, and haulage systems, with no underground

<sup>1</sup> 16 & 17 Geo. V. c. 28, s. 18.

<sup>2</sup> 35 & 36 Vict. c. 77, and 38 & 39 Vict. c. 39.

<sup>3</sup> *Anderson v. Lochgelly Iron and Coal Co., Ltd.*, 1904, 7 F. 187. See also *Monaghan v. United Collieries, Ltd.*, 1900, 3 F. 149; *Caton v. Summerlee, etc., Iron, etc., Co., Ltd.*, 1902, 4 F. 989; *Coylton Coal Co. v. Davidson*, 1905, 7 F. 727.

<sup>4</sup> *Shotts Iron Co. v. Brunton*, 1905 (O.H.), 13 S.L.T. 324.



connection, but certain surface machinery was common to both workings, they were held to be separate mines.<sup>1</sup> The mine includes all the seams opened up, and each seam is not a separate mine.<sup>2</sup>

975. The term "owner" includes a body corporate, and embraces a lessee or occupier, and (where necessary) a liquidator or receiver: but not a mere receiver of rent or royalty, nor an owner subject to a mineral lease, nor an owner of the soil not interested in the minerals. It includes, however, any contractor for the working of the whole or any part of a mine. A tenant under an agreement is a "lessee" and therefore an "owner," but he ceases to be such when the lease expires.<sup>3</sup>

976. The term "agent" means a person appointed or acting as the representative of the owner, and as such superior to the manager. The undernoted cases may usefully be referred to as illustrating the considerations which will,<sup>4</sup> and those which will not,<sup>5</sup> result in a person being held to be an agent.

#### SECTION 4.—MANAGEMENT.

##### SUBSECTION (1).—*The Manager.*

977. Every mine in which more than thirty persons are employed underground must be under the control of one manager, appointed by the owner, or agent, and that manager is responsible for the control, management, and direction of the mine. He must hold a first-class certificate, and his name and address must be intimated to the inspector of the division. The owner or agent, if qualified, may appoint himself manager, but otherwise must not take any part in the technical management of the mine. Where the manager dies or resigns, or ceases to be manager, a temporary appointment for not more than four months may be made of a competent person holding a first- or second-class certificate. In "small mines," employing less than thirty persons underground, the owner or agent is responsible for discharging the duties of manager, unless he voluntarily appoints a manager holding a first- or second-class certificate. The inspector of the division, however, may require a small mine to be under the control of a manager holding a first-class certificate (ss. 2, 5, and 6).

978. No manager may have charge of more than one mine, except (a) where the number of persons employed underground in all the mines does not exceed one thousand, and (b) where all the entrances to mines then in use lie within a circle having a two-mile radius. A separate under-manager for each is required where one person manages two or more mines (s. 4).

<sup>1</sup> *Moore & Co. v. Macmillan*, 1921 S.C. (J.) 9.

<sup>2</sup> *Thorpe v. Davies*, [1908] 2 K.B. 753.

<sup>3</sup> *Scott v. Dickinson*, 1876, 34 L.T. (N.S.) 291.

<sup>4</sup> *Stokes v. Mellor*, 1875, 39 J.P. 788.

<sup>5</sup> *Archibald v. Plean Colliery Co.*, 1924 S.C. (J.) 77.



SUBSECTION (2).—*Liability of Owners.*

**979.** It will be convenient here to consider the liabilities imposed on owners by the Act. The duties imposed on owners fall into two classes. One class comprehends both direct duties, which cannot be delegated, and absolute duties, which may be delegated. In each of these cases the owner is absolutely responsible for the performance of the duty in the absence of a statutory protection against liability for breach of the duty—such as for instance s. 102 (3) and (8), under which an owner is not to be criminally or civilly liable for breaches which it was not reasonably practicable to prevent.

**980.** The other class comprehends those qualified duties to breach of which it is a sufficient answer that reasonable care has been taken to ensure performance. Generally speaking, a qualified duty is discharged by the owner publishing the necessary provisions, and appointing competent officials to carry them out. But special circumstances may make a qualified duty more onerous. The question whether a duty is absolute or qualified depends on the terms of the provision in question, and also on the particular circumstances of the case. The ordinary rule of the common law as to onus of proof is, however, reversed. Under the statute the onus of proof is always on the person charged with neglect of duty, and in order to escape liability he must prove that the duty has been performed, because breach of a rule which it was his duty so far as possible to prevent raises a presumption against him which he is called upon to rebut.<sup>1</sup> It should be noted that the present Act differs from previous Acts in that many provisions which were formerly contained in general or special rules are now contained in sections of the Act.

**981.** In *Bett v. Dalmeny Oil Co.*<sup>2</sup> an action was brought for breach of the general rule (now s. 49) directing the securing of the roof and sides. The owner had appointed a competent manager, and had provided the necessary materials. The Court held that the rule imposed an absolute duty on the owner for breach of which he could not escape liability. This decision was criticised in *Calder v. Nimmo & Co.*<sup>3</sup> by Lord Salvesen, who pointed out that the general rules were all subject to the qualification that they should be observed so far as reasonably practicable in every mine. In the leading case of *Buller (or Black) v. Fife Coal Co., Ltd.*,<sup>4</sup> an action was brought for breach of certain general rules which provided that the ventilation should be adequate, that inspections for noxious gas should be made by competent persons, and that the manager should withdraw workmen in case of danger. The mine was subject to an unusual danger in the shape of carbon monoxide gas, which entered the mine through a connection with an adjoining mine. The owners

<sup>1</sup> *Black v. Fife Coal Co. Ltd.*, 1912 S.C. (H.L.) 33, per Lord Kinnear at p. 44.

<sup>2</sup> 1905, 7 F. 787.

<sup>3</sup> 1906, 14 S.L.T. 563.

<sup>4</sup> 1909 S.C. 152; rev. 1912 S.C. (H.L.) 33.

were well aware of the special danger, but had appointed officials who were ignorant of its existence, and had not the special knowledge necessary to fit them to deal with it. The Second Division held that, as the injury was due to the fault of fellow-servants, the owners could only be made liable if it was shewn that they had failed to use due care in the selection of competent persons to superintend the work. They therefore held that the owners, having appointed competent officials, were not liable. The House of Lords agreed that the duty imposed on the owners was not absolute, for the rules in question were subject to the general enactment that they were to be observed, not absolutely and in any event, but "so far as reasonably practicable in every mine." They also thought that if, when the owners became aware of the special danger from carbon monoxide gas, they had considered the question of the skill and experience necessary to deal with the emergency, and had continued to employ the officials originally appointed because they were still satisfied as to their ability, it might reasonably be said that they had done all in their power to meet the particular danger they had to consider. They reversed the decision of the Second Division, however, on the ground that the owners were guilty of a breach of statutory duty, because, being aware of the special danger, they had not appointed officials competent to deal with it.

982. In the subsequent case of *Watkins v. Naval Colliery Co., Ltd.*<sup>1</sup> the action was founded upon a breach of s. 16 (1) of the 1887 Act (s. 40 (1) of the present Act), which provides that no one shall be employed in a mine unless proper apparatus for raising and lowering persons is constantly available for use: and upon the breach of a general rule providing for the existence of an adequate brake. The accident was caused by a defect in the brake, and by the inadequacy of the machinery for raising and lowering persons. The House of Lords found that the plaintiff was entitled to judgment upon the ground that the provisions of s. 16 imposed on the owner an absolute obligation, to the allegation of a breach of which it was no answer that the owner had not been personally negligent. It was sufficient to point to the section without the necessity of resorting to the general rules. In *Rodger v. Fife Coal Co., Ltd.*<sup>2</sup> the First Division held that the duty imposed by s. 49 of making the roof and sides of travelling roads and working places secure is a duty laid on the owner, and not merely on the technical manager. The owner, therefore, on whom a statutory duty is laid by s. 49 cannot escape liability on the ground that under s. 2 (4) he is debarred from taking part in the technical management of the mine.

983. It is well settled that where there has been a breach of statutory duty the defence of common employment is not open to an employer.<sup>3</sup> The test of liability in civil and criminal cases is the same, and that

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<sup>1</sup> [1912] A.C. 693.

<sup>2</sup> 1923 S.C. 108.

<sup>3</sup> *Black v. Fife Coal Co., Ltd.*, *supra*, at p. 45.

which is a defence against criminal responsibility is a matter of defence also against civil responsibility.<sup>1</sup>

### SUBSECTION (3).—*Qualifications of Managers.*

**984.** Managers must be at least twenty-five, and under-managers at least twenty-three, years of age, and must be registered holders of certificates of competency. There are two certificates of competency granted under the Act—(1) first-class for managers, (2) second-class for under-managers—which are granted after examination by a Board appointed by the Secretary of State. Candidates must be at least twenty-three years of age, and must have had five years' (or, in the case of those who hold approved diplomas or degrees, three years') practical experience in mining. They must also undergo *viva voce* examination with reference to local mining conditions.<sup>2</sup> A register of holders of certificates is kept (ss. 5 to 10).

**985.** A public inquiry may be held into the competency of the holder of a certificate where representations are made to the Secretary of State that the holder is, by reason of incompetency or gross negligence, or misconduct, or conviction of an offence against the Act, unfit to continue to hold a certificate (s. 11). Section 1 of the Coal Mines Act, 1914,<sup>3</sup> extends this section to the case of any owner or agent who takes part in the technical management of a mine, and who is alleged, for the reasons above stated, to be unfit to hold a certificate. The Court may require the person into whose conduct inquiry is made to deliver up his certificate, which, according to its judgment, will be restored, cancelled, or suspended. Provision is made for the cancellation or suspension of certificates to be recorded in the register, and for their restoration upon good cause shewn. It is a misdemeanour, punishable with imprisonment with or without hard labour, to forge or counterfeit a certificate of competency, to use any forged certificate, or to make any false representations in order to obtain, for oneself or another, employment as a manager, under-manager, or in any other capacity (ss. 12 and 28).

### SUBSECTION (4).—*Duties of Managers.*

**986.** Under the Act itself there must be daily personal supervision by both the manager and the under-manager, and this is necessary even during holidays, when men are not actually working in the mine. Provision must be made for such supervision to be exercised by a qualified substitute when the manager or under-manager is temporarily absent (s. 3). The manager and the under-manager, or their substitutes, must

<sup>1</sup> *Watkins v. Naval Colliery Co.*, [1912] A.C. 693, at p. 705.

<sup>2</sup> See as to examinations S.R. & O. 1912, No. 1150, amended by S.R. & O. 1914, No. 402; S.R. & O. 1915, No. 181; S.R. & O. 1920, No. 1763, and 1912, No. 1538 (fecs); S.R. & O. 1919, No. 1291 (Qualifications) modified by S.R. & O. 1917, Nos. 126 and 1351.

<sup>3</sup> 4 & 5 Geo. V. c. 22.



also countersign, not later than the next day, all reports required to be recorded in books kept at the mine (s. 24).

**987.** These duties are amplified by Regulations 35 to 48 of the main code of General Regulations.<sup>1</sup> The manager must appoint in writing sufficient competent persons to secure thorough supervision of operations and enforcement of the requirements of the Act and Regulations. He must investigate complaints regarding matters of safety and health: must appoint lamp stations: and must ensure a sufficient supply of proper materials. He must determine and notify at the pit-head the number of persons who may ride in a cage at one time. The under-manager must assist the manager to enforce the provisions of the Act and to investigate complaints. Further, he must meet the firemen and other underground officials daily, and confer with them regarding their duties: see that necessary materials are sent into districts as required: and examine from time to time all travelable parts of the mine, whether they are being worked in or not. Other officials superior to firemen must confer daily with the firemen and other officials in their district, and see that their reports are properly recorded.

SUBSECTION (5).—*Firemen, Examiners, and Deputies.*

**988.** In every mine there must be one or more competent firemen appointed in writing by the manager to inspect the ventilation and the state of the roof and sides, and to ensure the general safety of those working in the mine. A fireman must (a) either hold a first- or second-class certificate of competency, or be over twenty-five years of age and have had five years' practical experience underground, including two years at the coal face; (b) hold a prescribed certificate of his ability to make tests for inflammable gas and to measure the quantity of air in an air current, and that his hearing is good; (c) every five years obtain a certificate that his eyesight and hearing are satisfactory.

**989.** A fireman must not do any work other than his statutory duties, except measuring work done, or firing shots, in his district. This rule, however, does not apply to mines in which less than thirty men are employed underground, mines in Durham and Northumberland, and mines exempted by the inspector. Any additional duties given to him must not interfere with the thorough performance of his statutory duties (ss. 14, 15). Where workmen themselves erect the supports for their own working places, the fireman must see that sufficient material is kept at the prescribed places. He must also examine all roofs from under which props are about to be withdrawn, and decide whether a safety contrivance should be used in doing so (ss. 51, 52).

**990.** Within two hours before work starts on each shift the fireman must inspect, and report upon, every part of the mine in which workmen are to work and pass, and all working places in which work is

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<sup>1</sup> S.R. & O. 1913, No. 748.



temporarily stopped, in order to detect the presence of gas and other sources of danger. Except in mines in which inflammable gas is unknown, the inspection must be made with a locked safety lamp. He must not allow any workman to pass the appointed stations until he has so inspected. Two similar inspections must be made during the course of the shift, although a written report need only be made of the second of such inspections. These reports must be posted at the pit-head before 10 a.m. next day, and remain posted for twenty-four hours. Where, for any reason, a mine or place is found to be dangerous, every workman must be withdrawn and a fireman must inspect it and make a full and accurate report, no workman being re-admitted (except for the purpose of removing the danger) until it has been reported not to be dangerous (ss. 63 to 67).

991. Under General Regulations 49 to 62,<sup>1</sup> the fireman after completing his inspection must meet the workmen at the lamp station and instruct them as to any precautions necessary for them to observe. He must record the number of workmen under his charge; fence off and mark dangerous places; confer with, and warn his successor; and report on the cause and nature of damage to safety lamps. He must see that brattice or air pipes used to ventilate the working places are sufficiently advanced to be effective; check the working of ventilation doors; and report if the apparatus used in his district is unsafe. He must at once report accidents, dangers, or defects. He must regularly travel along any unused means of egress. Except where shifts work continuously, he must at the end of the shift see that unnecessary lights are extinguished, main doors are closed, and ventilation is satisfactory. He must see that workmen observe the rules and any directions given with a view to safety, and may expel and report workmen guilty of infringement.

992. As an additional check on the condition of the mine, the workmen may at their own expense appoint two persons of experience, who must be permitted by the owner to inspect any part of the mine at least once a month. These inspectors must enter a report of their inspection in a book to be kept at the mine for the purpose. Where an accident has occurred, the workmen's representatives may make an inspection to discover the cause (s. 16).

#### SUBSECTION (6).—*Returns, Plans, and Abandoned Mines.*

993. Annually before 21st January the owner, agent, or manager of every mine must send to the inspector of the division a return of certain specified particulars regarding the management, number of persons employed, quantity of mineral gotten, ventilation, explosives, coal-cutting machines, safety lamps, and electrical apparatus: also particulars of all accidents during the year, and of the maintenance of

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<sup>1</sup> S.R. & O. 1913, No. 748.

rescue apparatus and rescue training (s. 18 and First Schedule). Notice must also be given to the inspector of the opening of any new mine or shaft, or the abandonment of old workings. Detailed plans of the workings of every mine and sections of the strata, brought up to date every three months, must be kept in the office of the mine, as also a plan of the ventilation system, and a plan shewing the position of all fixed electrical apparatus, other than cables, telephones, and signalling apparatus. These plans must be produced there to the inspector on request. Where a mine or seam is abandoned, similar plans and sections must be sent within three months to the Secretary of State for preservation. A mine or seam not worked for twelve months is to be deemed to have been abandoned unless the roadways and workings are maintained in an accessible condition (ss. 19, 20, 21).

**994.** Where different parts of a mine are worked separately, each part (after notice given to the inspector) may be treated as a separate mine. But where each part is not separately ventilated the inspector's permission is required for such division, and he may impose conditions (s. 25). Abandoned mines must be kept securely fenced by the owner and the persons interested in the minerals of the mine, so as to prevent accidents (s. 26).

## SECTION 5.—SAFETY PROVISIONS.

### SUBSECTION (1).—*General.*

**995.** Perhaps the most important part of the Act from the public point of view is that concerned with the enforcement of provisions designed to secure the safety of those employed in mines. The greater part of the regulations made under the Act have been made with that end in view. Before summarising the provisions of the Act on this subject, it will be as well to indicate briefly those regulations which apply generally to all persons working in the mine. These are contained in Regulations 1 to 34.<sup>1</sup>

**996.** Everyone employed must comply with the provisions of the Orders in force regarding the supply, use, and storage of explosives, and it is the duty of the management to enforce compliance therewith. The required notices must be posted in a conspicuous place, and promptly renewed when defaced. No one may enter or leave a cage until authorised to do so by the onsetter or banksman, whose orders must be obeyed. The gates must be shut before the cage is signalled away, and must not be interfered with except by persons authorised to give signals.<sup>2</sup> A workman must not go into parts of the mine other than that in which he works. Workmen engaged at the face, or in stonework, or timbering, must carefully examine the working place before commencing or recommencing work, and after a shot is fired, and must comply with the terms of the notice regarding the systematic support of the roof and sides

<sup>1</sup> S.R. & O. 1913, No. 748.

<sup>2</sup> See *Edgar v. Law & Brand*, 1871, 10 M. 236.

at the working face. Where anyone becomes aware of any source of danger he must at once take steps to have it remedied (if that be his duty), or else inform the officials. If sufficient material for supporting roof and sides is not available at the appointed place, the workman must at once withdraw, and report the matter.<sup>1</sup> No one shall, without authority, pass any fence or danger signal, or open any locked door, or remove any notice or marks made for the guidance of workmen.

**997.** No one shall brush or waft out gas, or allow any burning material to lie about in the mine, or leave his light in his working place. Every user of a safety lamp must examine it externally before and during use, and return it to the lamproom at the end of his shift. No one shall place a safety lamp on its bottom, unless authorised to do so, or in any event closer than two feet to the swing of the tool he is using. If a workman finds himself in gas he must not throw away his lamp, or try to blow it out. He must shelter it, hold it near the floor, and take it steadily into fresh air, or else smother the light or extinguish it in water. When examining for gas, the safety lamp must not be raised higher than necessary. So far as possible men working at the face must do so in such a way as at all times to leave a free passage for the air current, and must leave their working places safe. If that is impossible such places must be fenced off and the fact reported. Doors and flaps must be carefully closed. No one shall sleep while below ground or while in charge of machinery. Unauthorised persons must not interfere with signalling apparatus.

**998.** Where the fence across the entrance to a shaft is not worked automatically by the cage, the onsetter must not open it till the cage is at the entrance. Persons loading or unloading cages must be protected against things falling down the shaft, and no one is to cross the uncovered shaft bottom except to work, and then only when the cages are stopped. Trains run for the conveyance of workmen, whether above or below ground, must be in charge of a specially appointed man, who is to report anyone getting into or out of the train when in motion, riding on the footboard or buffers, or refusing to obey his directions. No one is to ride on any animal; nor may any person ride on any horse-drawn tram or tub except with the permission of the management. Riding on haulage ropes is prohibited. Men are prohibited from walking in front of a tub when taking it down an incline of more than 1 in 12. No one may be in or about the mine in a state of intoxication, or bring in intoxicating liquor without permission. No one shall negligently or wilfully do, or omit to do, anything likely to endanger life or limb. This includes omission to do acts which would mitigate the results of accidents.<sup>2</sup>

**999.** Persons injured by explosions, electricity, or overwinding, or absent from work on account of personal injury, must report the matter at once. The manager must arrange for a competent person to keep a

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<sup>1</sup> See *Heaney v. Glasgow Iron and Steel Co.*, 1898, 25 R. 903.

<sup>2</sup> *Felton v. Heal*, [1920] 3 K.B. 1.



record of persons going below ground and returning to the surface daily. The manager must post at the pit-head a sketch plan shewing the main roads, means of egress, and telephone stations underground. The duties of a fireman may in emergency be performed by any duly qualified superior official. Before anyone employs any helper, drawer, or other assistant, the sanction of an official superior to a fireman must be obtained. Every official must carry out the duties assigned to him, and must enforce the provisions of the Act and the Regulations relating thereto.

#### SUBSECTION (2).—*Ventilation.*

**1000.** One of the chief dangers in coal mining arises from accumulations of gas. The Act accordingly provides that an adequate amount of ventilation shall be constantly produced in every mine to render inflammable and noxious gases harmless, so that all working places shall be in a fit state for working and passing therein. Intake airways especially must be kept normally free from inflammable gas to within 100 yards of the working face. This requirement applies even during temporary cessation of work, as for instance for rest at night or on Sunday. An abandoned road or level not in use need not be ventilated if it is properly fenced off, unless ventilation is necessary to make adjacent workings safe.<sup>1</sup> The duty thus imposed on owners is a qualified duty.<sup>2</sup> The duty, however, may be enlarged by the special circumstances of the case,<sup>3</sup> and an owner will be liable where he has taken part in the management.<sup>4</sup> A complaint must state in what respect the system of ventilation is defective.<sup>5</sup> No liability is incurred for failure to ventilate when the ventilation was interrupted in consequence of an accident, and no persons were employed in the unventilated area other than those required to restore the ventilation (s. 29).

**1001.** The quantity of air in the main intake airways and in every split, and at a point in each ventilating district 100 yards back from the first working place, must be measured and recorded once a month.<sup>6</sup> The standard laid down by the Act is that, if the air contains less than 19 per cent. of oxygen or more than  $1\frac{1}{4}$  per cent. of carbon dioxide, it is not in the fit state required. If an intake airway has on an average more than  $\frac{1}{4}$  per cent. of inflammable gas it fails to fulfil the statutory requirements (s. 29 (2) and (3)). A classification of mines may be made by General Regulations requiring a higher standard of ventilation in certain classes of mines (s. 30), but no such regulations have yet been made.

**1002.** Except in small mines, no fire is to be used below ground for ventilation in any mine newly opened after 16th December 1911; and

<sup>1</sup> *Brough v. Homfray*, 1868, L.R., 3 Q.B. 771; *Atkinson v. Morgan*, [1915] 3 K.B. 23.

<sup>2</sup> *Black v. Fife Coal Co.*, 1912 S.C. (H.L.) 33.

<sup>3</sup> *Anderson v. Atkinson*, 1908, 99 L.T. 22.

<sup>4</sup> *Atkinson v. Lewis Merthyr Collieries, Ltd.*, [1916] 1 K.B. 363.

<sup>5</sup> *Roberts v. Atkinson*, 1890, 18 R. (J.) 8.

<sup>6</sup> Regulation 77 of S.R. & O. 1913, No. 748.



where a fire is used for ventilation the return air must be carried off clear of the fire, except in mines where inflammable gas is unknown. Ventilating fans, unless auxiliary only, must not be placed beneath the surface; and adequate means for reversing the air currents must be maintained in a condition to be put into immediate operation (s. 31).

**1003.** Under the General Regulations the duties of persons in charge of ventilating apparatus other than auxiliary fans are specified. All fans must have water gauges or automatic indicators. Ventilating machinery must be kept running at the speed ordered by the management, and the indicators must be examined at specified intervals. Defects or a stoppage of the machinery must be at once reported. The ventilating pressure must also be periodically observed and recorded.<sup>1</sup>

#### SUBSECTION (3).—*Safety Lamps.*

**1004.** No lamp or light other than a locked safety lamp (which must be provided by the owner, and be of a type approved by the Secretary of State) may be used (1) in any seam in which the air in the return airway normally contains more than  $\frac{1}{2}$  per cent. of inflammable gas, or in which an explosion causing personal injury has occurred during the preceding year, unless special exemption be given; (2) in any place in which inflammable gas is likely to accumulate in dangerous quantities, or in any working near to or approaching such a place; (3) in any place where the regulations of the mine require the use of safety lamps. Electric lamps, however, if enclosed in airtight fittings and having hermetically sealed globes, may be used on main intake airways up to 300 yards from the working face, and on main return airways and haulage roads within 300 yards of the upcast shaft, but not within 300 yards from the working face.<sup>2</sup> Except when the use of safety lamps is a temporary precaution, the introduction of safety lamps into one place in a ventilating district makes their use necessary throughout the return airway portion of the same district; and once introduced, their use cannot be dispensed with except with the sanction of the inspector (ss. 32, 33).

**1005.** Every safety lamp must be thoroughly examined at the surface each time before use by a competent person appointed in writing, and a record must be kept of the man to whom it is given out. Damage to it, discovered on inspection, must be at once recorded in a special book, and such damage is deemed to have been due to the fault of the person to whom it was given out, unless he proves the contrary. It may not be unlocked or relighted unless by an appointed person at an appointed place, and no one may remove any part of it while in ordinary use.<sup>3</sup> In a safety lamp area no person may have in his possession matches or smoking material, and search must be made for them on a system

<sup>1</sup> S.R. & O. 1913, No. 748, Regulations 69 to 73.

<sup>2</sup> General Regulations 78 of S.R. & O. 1913, No. 748.

<sup>3</sup> See *Barkey v. Moore & Co.*, 1923 S.C. 46; 1923 S.C. (H.L.) 101.

approved by the inspector before work is commenced underground (ss. 34, 35).

**1006.** Numerous orders have been made under s. 33, giving the approval of the Secretary of State to various types of safety lamps. These are too numerous to recapitulate. A list of the safety lamps thus approved and corrected, to 31st December preceding, will be found in "Regulations and Orders Relating to Mines under the Coal Mines Act, 1911."<sup>1</sup> The General Regulations authorise the use underground of apparatus for the relighting electrically of safety lamps, subject to certain conditions; and also prescribe the manner in which the search for prohibited articles, such as matches and smoking materials, shall be conducted.<sup>2</sup>

**1007.** Safety lamps must be used with electric motors in any part of a mine in which inflammable gas, although not normally present, is likely to occur in quantity sufficient to be indicative of danger, and must be provided for members of rescue brigades.<sup>3</sup>

There is a general prohibition against unlocking or opening any safety lamp in any mine in which safety lamps are required to be used, after a date to be determined,<sup>4</sup> but no such date has as yet been determined.

#### SUBSECTION (4).—*Shafts and Winding.*

**1008.** Every working seam must be in communication with at least two shafts or outlets affording separate means of ingress and egress for those working in the seam. Except in the case of certain old mines, the shafts must be separated by at least 15 yards, and must have between them a communication 4 feet wide and 4 feet high. Every part of the mine in which more than ten persons are working must have two means of access to the surface, each available when the other is impassable. These provisions do not apply to new mines or seams being opened to afford communication between shafts or to search for minerals, or to proved mines specially exempted by the Secretary of State, so long as not more than twenty persons are employed underground (s. 36).

**1009.** The top and bottom of every working, ventilating, or pumping shaft, and all entrances into the workings therefrom, as well as all entrances to places below ground not in actual course of working,<sup>5</sup> as also the top of a disused shaft must be kept securely fenced.<sup>6</sup> In the case of disused shafts or workings the fence must be kept secure, without an opening. Otherwise, provided proper precautions are observed, the

<sup>1</sup> As to lamp glasses see S.R. & O. 1918, No. 1419; 1919, No. 433; 1923, No. 1140; and 1925, No. 1055.

<sup>2</sup> S.R. & O. 1912, No. 1628, Regulation 135 of S.R. & O. 1913, No. 748, and S.R. & O. 1912, No. 510.

<sup>3</sup> Regulations 132 (v.) and 142 of S.R. & O. 1913, No. 748.

<sup>4</sup> Regulation 31 of S.R. & O. 1920, No. 1423.

<sup>5</sup> *Hogg v. J. Waldie & Sons*, 1886, 24 S.L.R. 14.

<sup>6</sup> *Simpson v. Moore*, 1874, 3 Coup. 26.

fence may be temporarily removed when necessary.<sup>1</sup> Working or pumping shafts, and shafts in the course of being sunk, must be securely cased or lined (ss. 37, 38).

**1010.** Each of the two shafts, and any other shaft for the time being in use, must have separate winding apparatus, adequate for the work it has to do,<sup>2</sup> kept constantly available for use. This means that it must be available when necessary, but does not give a miner the right to be raised to the surface whenever he so desires.<sup>3</sup> The duty imposed by the section is absolute.<sup>2</sup> With certain exceptions, no person may be raised or lowered except in a cage which fulfils the statutory requirements. In vertical shafts the winding apparatus must have a detaching hook, and, in the case of shafts more than 100 yards deep, a device to prevent overwinding. In general, guides must be provided in all working shafts over 50 yards deep. Keps to support the cage when at rest must be provided at the surface level. Winding ropes must be recapped every six months, and must not be used for raising or lowering persons for more than three and a half years, or if spliced. Every cage must have catches to prevent tubs falling out, closed-in sides, gates or fences at its ends, and a hand bar. The winding-drum must have flanges to prevent the rope from slipping. All winding apparatus must also have a brake or brakes strong enough to hold the loaded cage at any point in the shaft, and (in addition to any marks on the rope) an indicator shewing its position therein (s. 40). The section is not complied with where, although the brake is useless, the pumping gearing acts as a brake.<sup>4</sup>

**1011.** No minerals or materials, save in certain exceptional circumstances, may be raised or lowered while persons are being raised or lowered in the same shaft. Proper means of signalling must be provided between the top and bottom of the shaft and entrances to the shaft in every case where the shaft is more than 25 yards deep<sup>5</sup> (ss. 40 (11) and 41).

**1012.** The General Regulations provide that, except in small mines, the winding apparatus must be worked by mechanical power. It must be capable of raising and lowering persons with ease, regularity, and safety, and the drum shafts, if more than 10 inches in diameter, must be bored longitudinally. It must also be firmly fixed to a rigid foundation. In small mines it must be efficiently constructed and maintained, and provided with a brake sufficient to hold the load in the shaft at any point. Cage chains must be annealed every six months, and detaching hooks refitted every three months. When a winding rope is capped or recapped, a competent person appointed in writing by the manager must superintend the work. No mode of capping must be used which fails

<sup>1</sup> *Sinnerton v. Merry & Cunninghame*, 1886, 13 R. 1012; *M'Gill v. Bowman & Co.*, 1890, 18 R. 206.

<sup>2</sup> *Watkins v. Naval Colliery Co.*, [1911] 2 K.B. 162; [1912] A.C. 693.

<sup>3</sup> *Herd v. Weardale Steel Co.*, [1915] A.C. 67.

<sup>4</sup> *Nimmo v. Clark & Wilson*, 1872, 10 M. 477.

<sup>5</sup> *Edgar v. Law & Brand*, 1871, 10 M. 236.



to withstand certain specified strains. Certain methods of capping are prohibited, and directions given as to the mode in which other methods are to be carried out.<sup>1</sup>

SUBSECTION (5).—*Travelling Roads and Haulage.*

**1013.** For every seam there must be two main airways, while for new mines and seams in old mines opened after 1st July 1912 (unless exempted) there must be three of such size and kept in such condition as to afford ready access to and from the workings. In the latter case two must be intakes, one of which must not (unless exempted) be used for the haulage of coal. Exemption from these provisions is given for certain classes of mines by General Regulations. In seams or mines newly opened all stoppings between main airways and all air-crossings must so far as practicable be so constructed as to withstand the effects of an explosion; and where the air in the main return airway normally contains more than  $\frac{1}{2}$  per cent. of inflammable gas, that airway must not (with certain exceptions) be used for the haulage of coal (s. 42).

**1014.** Travelling on foot on the haulage roads is forbidden (except to officials, or persons employed on the haulage, or on urgent repairs) while the haulage is in motion by gravity or mechanical power, unless there is along one side of the road a clear space of at least 2 feet wide (clear of all props) between the tubs and that side of the road, and the rate of haulage is not more than 10 miles an hour. In the case, however, of mines opened before 1st July 1912, or of mines in which the character of the strata makes it unreasonable to require a clear space as above, travelling is allowed without such a clear space if the rate of haulage is not more than 3 miles an hour and the general gradient does not exceed 1 in 12. But in such cases any space between the tracks of rail must be kept clear from obstructions (s. 43 (1) and (4)).

**1015.** Where the haulage is worked by gravity or mechanical power no one shall be allowed to ride on trains of tubs except a person employed to detach or attach tubs in trains moving at not more than 3 miles an hour, men with a written permit being conveyed to and from their work, and the driver of a locomotive. The prohibition applies both to the person who rides and to anyone allowing him to ride; it applies also to riding on a single tram.<sup>2</sup> In places where trains of three or more tubs are coupled or uncoupled there must be 2 feet between the tubs and the side, unless there is a clear space of 3 feet between tubs standing on double rails (s. 43 (2) and (3)).

**1016.** Every haulage road, whether worked by mechanical or animal power or by gravity, must be provided with refuge holes, up to within 25 yards of the working face, at intervals varying from 10 to 25 yards according to the method of haulage and the gradient. Every refuge hole

<sup>1</sup> Regulations 79 to 88 of S.R. & O. 1913, No. 748.

<sup>2</sup> *Morgan v. Evans*, 1925, 42 T.L.R. 103.



must be 3 feet wide, 4 feet deep, and as high as the haulage road, or 6 feet, whichever is the less; it must be on the same side as the clear space for travelling, and must be numbered, if necessary whitewashed, and kept clean and free from obstacles.<sup>1</sup> The opinion has been expressed that the mouths of cross-roads may be considered to be refuge holes.<sup>2</sup> Where a road was divided into two passages by an old wall, broken down in many places, it was regarded as being two roads<sup>3</sup> (s. 44).

**1017.** Suitable sprags, lockers, or drags must be provided and used at the top of every self-acting incline, at places where trains are coupled or uncoupled, and on animal-haulage roads where the gradient exceeds 1 in 20. Stop blocks must be provided at the top of every self-acting incline and at entrances thereto, unless the haulage is endless rope or endless chain. Where mechanical haulage, other than endless rope or endless chain haulage, is used, and the gradient exceeds 1 in 12—but not where the haulage is by gravity<sup>4</sup>—run-away switches, back-stays to prevent tubs running back, and appliances to prevent tubs breaking loose where persons are riding in them, must also be provided. On all gravity or mechanical haulage roads exceeding 30 yards in length on which persons travel, a signalling system must be provided, and every haulage road must be of adequate height and kept clear of obstructions (ss. 45 to 48).

**1018.** Compliance with the provision of the Act requiring two main intake airways is dispensed with in special cases, for the details of which reference is made to the regulations undernoted.<sup>5</sup> Details are also given regarding the construction of stoppings.

#### SUBSECTION (6).—*Support of Roof and Sides.*

**1019.** The roof and sides of every travelling road and working place must be made secure, and no one may use such places unless that is done (s. 49). This is a duty laid on the owner, upon whom rests the burden of proof that the statutory requirements have been fulfilled.<sup>6</sup> He cannot escape responsibility on the ground that s. 2 (4) prohibits him, when unqualified, from taking part in the technical management of the mine.

**1020.** Where props and other supports are used to support the roof or the working face, the roof under which any work of getting or filling is being done, must be systematically and adequately supported. This must be done in accordance with a notice published by the manager, specifying the manner in which supports are to be advanced and the maximum intervals to be observed. Holing props or sprags must also be

<sup>1</sup> *Ferris v. Cowdenbeath Coal Co., Ltd.*, 1897, 24 R. 615.

<sup>2</sup> *Hughes v. Clyde Coal Co.*, 1891, 19 R. 343, per L. J. C.

<sup>3</sup> *Wilson v. Wishaw Coal Co.*, 1883, 10 R. 1021.

<sup>4</sup> *Soutar v. Reid*, 1913 S.C. (J.) 84.

<sup>5</sup> Regulations 89 to 91 of S.R. & O., 1913, No. 748.

<sup>6</sup> *Bett v. Dalmeny Oil Co.*, 1905, 7 F. 787; *Calder v. Nimmo & Co., Ltd.*, 1906, 14 S.L.T. 563, but see par. 981; *Rodger v. Fife Coal Co.*, 1923 S.C. 108.

set regularly in the manner directed by the notice as soon as practicable, and in no case must the interval between them exceed 6 feet.<sup>1</sup> They must not be removed until the coal is about to be taken down and the roof supports have been advanced. The roof and sides must also be systematically and adequately supported in accordance with the notice in roads where trains of tubs are coupled or uncoupled. If the inspector regards the system of support as unsatisfactory he can require the manager to modify the system (s. 50). A workman may also, where necessary for safety, set supports in his working place at more frequent intervals than those specified, though this will not absolve the owner from liability if the support is in fact inadequate.<sup>2</sup>

**1021.** Where workmen themselves erect supports at their working places, a sufficient supply of suitable material must be kept within 10 yards of every working place, and also at the pass-bye, siding, or other similar place convenient to the workmen.<sup>3</sup> The fireman must ensure that this is done. Where roof supports are removed, temporary supports have to be used. Safety contrivances must be used in withdrawing props from the waste or goaf, and in withdrawing props from a roof which a fireman considers to be insecure (ss. 51, 52).

#### SUBSECTION (7).—*Signalling.*

**1022.** There must be at the top of every shaft, when persons are about to be lowered, and so long as anyone is in the mine below ground, a competent person (banksman) for the purpose of receiving and transmitting signals in accordance with the code prescribed by General Regulations. In addition, there must be a competent person at every entrance from the workings into the shaft by which persons are raised, unless the only persons in the mine are officials or authorised signallers.<sup>4</sup> All signals sent to the surface must be sent simultaneously to the engine-man and the banksman. Such telephonic communication between different parts of the mine and the surface must be provided as may be required by the regulations of the mine (ss. 53, 54).

**1023.** General Regulations provide two codes of signals, one for use in connection with winding in shafts, the other for use in connection with underground haulage other than animal haulage. The manager must fix any additional signals necessary, *e.g.* to indicate the various levels in a shaft, or the various districts on a haulage system. Notices containing both the general code of signals and the additional signs fixed by the manager must be posted at the engine-house, pit-head, and each entrance into the workings; and those for the haulage system at the hauling engine-house and each signalling station. An automatic

<sup>1</sup> See *O'Hara v. Cadzow Coal Co., Ltd.*, 1903, 5 F. 439.

<sup>2</sup> *Gibbon v. Phillips*, 1895, 64 L.J.M.C. 42.

<sup>3</sup> See *Stewart v. Coltness Iron Co.*, 1877, 4 R. 952; *Heaney v. Glasgow Iron and Steel Co.*, 1898, 25 R. 903.

<sup>4</sup> See *Murdoch v. Mackinnon*, 1885, 12 R. 810.

indicator must be provided shewing the winding engineman the signal until it is complied with. Unauthorised persons must not give signals. The provision of telephonic communication is made compulsory (except in small mines and mines in the Cleveland District) where the distance of the main haulage from the shaft exceeds 1000 yards.<sup>1</sup>

#### SUBSECTION (8).—*Machinery.*

**1024.** All fly-wheels and exposed and dangerous machinery must be kept securely fenced.<sup>2</sup> Steam-boilers must be provided with safety-valves, steam-gauges, and water-gauges, and must be periodically examined and cleaned out, and the result reported in a special book. Steam-boilers may not be placed underground, and after the passing of the Act internal combustion engines may be used there only with the permission of the Secretary of State (ss. 55, 56, and 58).

**1025.** A winding engineman employed to wind persons must be competent, not less than twenty-two years of age, and appointed in writing by the manager. This provision applies even during the raising of material only and not persons.<sup>3</sup> He must attend during the whole time that anyone is below ground,<sup>4</sup> and must not be employed for more than eight hours a day. Persons in charge of haulage machinery of over 10 horse power, or any part thereof, must be competent and over eighteen years of age (s. 57).

**1026.** General Regulations provide also that boiler-minders must throughout the day examine the boiler, its fittings, and dampers, and report defects or derangements. No one is to be allowed to interfere with the weights on any safety-valve. The water must be kept at the proper level, and the pressure of steam on no account exceeded.<sup>5</sup>

**1027.** The winding engineman must, once a shift, carry out a thorough examination of his engine and its brakes and indicators. If he finds defects he must not commence or continue winding until he has reported the matter to the management. He must keep the engine well oiled, and must on no pretext leave the handles while the engine is in motion or anyone is in the cage. Unless signals are quite clear, he must not set his engine in motion. Before raising or lowering any person after any cessation lasting more than two hours, he must run the cages at least once from top to bottom to make sure everything is in order. He must not allow unauthorised persons into the engine-house, nor allow anyone to work the engine without written permission.<sup>6</sup>

<sup>1</sup> Regulations 92 to 103 of S.R. & O. 1913, No. 748, as amended by Regulation 30 of S.R. & O. 1920, No. 1423.

<sup>2</sup> *Hamilton v. Hermand Oil Co., Ltd.*, 1893, 20 R. 995.

<sup>3</sup> *Soutar v. Clark*, 1904, 7 F. (J.) 1.

<sup>4</sup> See *H.M. Advocate v. Hamilton*, 1874, 3 Coup. 19.

<sup>5</sup> Regulations 74 to 76 of S.R. & O. 1913, No. 748.

<sup>6</sup> Regulations 63 to 68 of S.R. & O. 1913, No. 748.



SUBSECTION (9).—*Electricity.*

**1028.** Electricity must not be used where it would be dangerous to life on account of the risk of explosion of gas or coal dust, and whenever there is more than  $1\frac{1}{2}$  per cent. of inflammable gas in the air at any place, the electric current (other than that in signalling wires) must be at once cut off. An inspector may, if he thinks it advisable, require the immediate discontinuance of the use of electricity (s. 60).

**1029.** The General Regulations regarding the use of electricity are numerous and technical.<sup>1</sup> They apply to electricity below ground, and (with modifications) above ground. The general objects aimed at are to secure that electrical apparatus shall be sufficiently insulated and protected to prevent danger to persons coming into contact with it, and also to prevent the emission of sparks which might ignite inflammable gas.

**1030.** Before electricity is introduced or reintroduced into any mine, or into any ventilating district in any mine, the inspector must be notified. If he wishes to object, he must do so in writing within one month. Plans shewing the position of all fixed electrical apparatus (other than signalling apparatus) must be kept. Notices must be exhibited prohibiting interference by unauthorised persons, and containing directions as to procedure in cases of fire and electric shock. Appliances for dealing with fire must be kept beside all electrical apparatus other than cables. Where necessary to prevent danger or mechanical damage, transformers and switchgear must be housed in a separate room, compartment, or box of non-inflammable material. All apparatus must be sufficiently powerful and adequately protected. Insulating material must be effective for its purpose, and designed to withstand working conditions of temperature and moisture. Means must be provided to indicate defects of insulation. With certain exceptions, every part of a system must be insulated from earth; and where earthed it must be connected to an earthing system at the surface. All metallic covers and handles, and the bedplates of motors, unless efficiently protected, must be earthed. Electricity supplied at high pressure must be transformed to medium or low pressure before use, except in fixed machines in which the high pressure parts are stationary. Conditions are laid down regarding the construction of switchgear and terminals, cable-ends, and cable joints. A switch for cutting off the current to the mine must be provided at the surface, with a person authorised to operate it available all the time any cable is live. Means must also be provided for cutting off all current from every part of a system, and there must be an automatic cut-out for each circuit. Cables must be covered with insulating material and protected against mechanical damage. Medium or high-pressure cables must be either concentric or protected

<sup>1</sup> See Part III. (Regulations 117 to 137) of S.R. & O. 1913, No. 748, as amended by Regulation 33 of S.R. & O. 1920, No. 1423.



by a metallic covering. The same condition applies where cables are laid in a roadway used for mechanical haulage, and where there is risk of igniting gas or coal-dust. Certain requisites are specified for metallic coverings. A flexible cable for portable apparatus must be covered with insulating material sufficiently protected from mechanical damage, and there must be a switch where it leaves the main cable.

**1031.** Everyone appointed to work, supervise, or examine electrical apparatus must be competent. Electricians must be appointed in writing by the manager, must attend daily at the mine, must examine all apparatus as often as may be necessary to prevent danger, and must test all new apparatus before use. A daily log book must be kept. If there be a fault in any circuit, the part affected must be made dead without delay until the fault is remedied. Precautions must be taken to discharge electrically any apparatus if there is danger to persons working thereon. Persons working electrical coal-cutters or other portable machines must not leave the machine while it is working, and before leaving the working place must cut off the current from the flexible cable. Such flexible cables must be examined once in each shift by the person in charge of the machine, and replaced if necessary.

**1032.** Special additional requirements are laid down for any part of a mine in which inflammable gas, though not normally present, is likely to occur in dangerous quantities. These are designed to prevent danger from open sparking. Current from lighting or power circuits must not be used for firing shots. In electric signalling systems the voltage must not exceed 25, and precautions must be taken to prevent signal wires from touching cables. Relighting apparatus must be designed and worked so as to preclude the accumulation of explosive gas within it. Haulage by electric locomotives on the overhead trolley wire system is prohibited in any mine in which coal is worked, but haulage by storage battery locomotives may be used in any mine with the consent of the Board of Trade.

**1033.** On the ground of emergency or special circumstances, exemption from the requirements of the General Regulations regarding electricity may be obtained from the Board of Trade. The requirements regarding the construction of cables and other apparatus did not until 1st January 1920 apply to apparatus in use before 1st June 1911, unless the inspector by written notice so directed. This exemption was held not to apply to unprotected cables used in a ventilating road before 1911, and transferred in 1914 to a mechanical haulage roadway.<sup>1</sup>

#### SUBSECTION (10).—*Explosives.*

**1034.** The Secretary of State may by order regulate the supply, use, and storage of explosives in mines. He may prohibit, either absolutely or subject to conditions, the use of any explosive likely to be dangerous

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<sup>1</sup> *Shotts Iron Co. v. Thomson*, 1915 S.C. (J.) 29.

in mines, or any class of mines. All explosives must be provided by the owner, who may not charge a workman more than the actual net cost (s. 61). The actual net cost includes not only the cost of carriage to the owner's magazine, but also the cost of distribution from the magazine to the workman.<sup>1</sup>

**1035.** The General Regulations regarding explosives are contained in the Explosives in Coal Mines Order of 1st September 1913,<sup>2</sup> as amended by various subsequent Orders.<sup>3</sup> The principal Order, so amended, will be found printed in "Regulations and Orders Relating to Mines under the Coal Mines Act, 1911," and appended to it is a List of Permitted Explosives corrected to 31st December preceding, which summarises the contents of the various Orders approving of explosives. Part I. of the Order contains general provisions applicable to all mines. Part II. contains special provisions applicable to certain classes of mines.

**1036.** No explosive substance may be stored underground, and a suitable place must be provided for its storage above ground. Explosives may only be used underground in the form of cartridges of certain specified sizes, and until about to be used they must be kept in a canister containing not more than five pounds. Drills used for boring shot-holes must allow a clearance of  $\frac{1}{8}$  inch over the diameter of the cartridge. Warming pans must be provided for explosives containing nitro-glycerine. Detonators must be kept in a place of storage under the sole control of the manager, or someone specially authorised in writing by him. In mines to which the special provisions apply, they shall be issued only to appointed shot-firers; in other mines only to specially authorised officials. Until about to be used they must be kept in a locked box separate from all other explosives.<sup>4</sup> Relaxations from these provisions are allowed in the case of shafts being sunk or deepened.

**1037.** Every charge must be placed in a properly drilled shot-hole, and shall be sufficiently stemmed with clay or some other non-inflammable substance. No explosive may be forcibly pressed into a hole. Once a hole has been charged the explosive must not be unrammed nor any part of the stemming removed.<sup>5</sup> The direction of the hole must be marked on the roof. Before firing the shot, the shot-firer must see that everyone in the vicinity has taken proper shelter.

**1038.** No shot shall be fired except by means of an efficient magneto-electrical apparatus, or by means of a fuse complying with the conditions laid down in Schedule IV. In coal mines in which the use of safety lamps is not required, and to which the special provisions do not apply, and also in mines other than coal mines, shots may be fired with squibs complying with Schedule V., subject to certain conditions. After the

<sup>1</sup> *Evans v. Gwendraeth Anthracite Colliery Co., Ltd.*, [1914] 3 K.B. 23.

<sup>2</sup> S.R. & O. 1913, No. 953.

<sup>3</sup> S.R. & O. 1915, No. 278; 1919, No. 1687; 1922, No. 1000; and 1924, No. 1016.

<sup>4</sup> Since the decision in *Tennant v. Allardice*, 1915 S.C. (J.) 9, S.R. & O. 1913, No. 953, has been amended by S.R. & O. 1915, No. 278.

<sup>5</sup> See *Lynch v. Baird & Co., Ltd.*, 1904, 6 F. 271.

shot has been fired, the shot-firer must make a careful examination of the place. Shots may be fired electrically only by a specially authorised person, who must himself make the cable connections to the detonator and the firing apparatus. All electrical firing apparatus must conform to certain specified constructional details. If a shot misses fire, no one shall approach the shot-hole until after an interval of ten minutes in the case of shots fired by electricity or by a squib, and of one hour in other cases.<sup>1</sup> Various other precautions are also enjoined, and one or more other shots must be fired to dislodge the miss-fired shot. The circumstances must at once be reported.

**1039.** In all coal mines in which inflammable gas in dangerous quantities has been found within the previous three months, and in coal mines which are not naturally wet throughout, only permitted explosives may be used in the dangerous parts of the mine. In such cases no shots may be fired except by a specially appointed shot-firer, who may not be a person whose wages depend on the amount of the mineral to be gotten, and who must possess certain specified qualifications. He must keep a daily record of shots. Every shot must be charged and stemmed under his supervision, and the cartridges used must bear a special mark. Before the shot is fired he must examine for gas with a locked safety lamp. The area within a radius of 5 yards must also be treated with water or incombustible dust, unless the management in writing dispense with this precaution on being satisfied that the natural conditions for the time being render any coal dust harmless, in which case the inspector must be notified. With certain exceptions, two or more shots must not be fired in the same place simultaneously. Special conditions are laid down regulating the firing of shots in main haulage roads and main intake airways in mines which are not naturally wet throughout, and additional precautions have to be observed in the case of sinking operations. Where a mine contains separate seams, the Order applies to each seam as if it were a separate mine. Copies of the Order must be supplied to every shot-firer and kept posted up in some conspicuous place.

SUBSECTION (11).—*Prevention of Coal Dust and Precautions  
against Spontaneous Combustion of Coal.*

**1040.** In order to prevent explosions of coal dust, arrangements must be made in all mines, in which the floor, roof, and sides are not naturally wet throughout, to prevent as far as practicable coal dust from the screens entering the downcast shaft. Consequently, except in the case of mines existing before 16th December 1911, screening plant must be at least 80 yards from any downcast shaft. Tubs must be designed so as to prevent, so far as practicable, the escape of coal dust. The floor of every travelling road must be cleared of dust at regular intervals, to be agreed upon between the manager and the workmen, or their represen-

<sup>1</sup> *Tennant v. Gilmour*, 1923 S.C. (J.) 19.



tatives. Systematic steps must be taken by watering or otherwise, in accordance with the regulations of the mine, to prevent explosions of coal dust. The roads must also be examined daily and reported on.<sup>1</sup>

**1041.** General Regulations have been made under this section which apply to all mines in which coal other than anthracite is worked. The floor, roof, and sides of every accessible road shall be treated either with incombustible dust, or with water, or in some other manner to be approved by the Board of Trade. Treatment with incombustible dust must be such as will reduce the combustible matter in the dust to 50 per cent. of the whole. Treatment with water shall be such that the dust is always combined throughout with 30 per cent. by weight of water in intimate mixture. The percentage of incombustible dust required may, however, be reduced correspondingly according to the percentage of water present in the mixture. These requirements need not be observed in seams in which anthracite only is worked. They may be dispensed with also if, and so long as, the natural conditions, as ascertained by prescribed tests, are found to comply with the requirements. A standard is laid down for incombustible dust, and the procedure to be followed in testing the composition of the dust is detailed. Special tests have been prescribed for dust mixtures which contain carbonates, moist dust mixtures which cannot be sieved, and dust mixtures which contain gypsum. Tests must be made as often as necessary, but not less frequently than once a month, and the results recorded and posted at the pit-head. Where the natural conditions are satisfactory, tests need not be made more frequently than once in three months. Definitions are given of "road" and "travelling road."<sup>2</sup>

**1042.** The Act itself does not prescribe any special precautions against the spontaneous combustion of coal. These, however, are set forth in Regulations<sup>3</sup> which apply to all safety-lamp mines, and where the Board of Trade so direct to any other mines. Where there are signs of a fire breaking out below ground, all workmen other than those engaged in dealing with the emergency must be withdrawn from the ventilating district affected. An examination and report must be made by the manager, fireman, and two representatives of the workmen, and no workman may be readmitted until the mine is reported to be safe. If there be disagreement, the question is referred to the inspector. Where a fire is known to exist, all workmen must be withdrawn from the seam affected until it is reported safe. Some relaxation of this provision is allowed in the case of seams or ventilating districts which are naturally wet throughout, or in which precautions approved by the Board of Trade have been adopted to guard against the spread of an explosion of coal dust. While a fire is being dammed off, every workman must be withdrawn from the mine. Two suits of breathing apparatus, or two smoke helmets, must be available the whole time near the place, and approved

<sup>1</sup> Sec. 62, as amended by Regulation 6 of S.R. & O. 1920, No. 1423.

<sup>2</sup> Part I. of S.R. & O. 1920, No. 1423, as amended by S.R. & O. 1924, No. 1364.

<sup>3</sup> Regulations 9 and 10 of S.R. & O. 1920, No. 1423.



precautions must be taken to render harmless the coal dust in places contiguous to the seat of fire. Similar precautions must be adopted where the existence of a fire has been definitely ascertained in mines to which the foregoing Regulation does not apply.

SUBSECTION (12).—*Inspections and Withdrawal of Workmen.*

**1043.** Within two hours before work starts on each shift the fireman must examine every part of the mine in which workmen are to work and pass, and all working places in which work is temporarily stopped, in order to detect the presence of gas and other sources of danger. The result of the inspection must be at once reported in a book accessible to the workmen, who may not pass the appointed station until that part of the mine has been reported safe. Except where inflammable gas is unknown, the inspection must be made with a locked safety lamp. A similar inspection must be made at least twice in each shift, but only the second of such inspections need be recorded in the book. An examination and report of the machinery and gear used for raising or lowering persons must be made once daily, and of all other machinery and gear actually in use, as also all shafts and airways, once a week by competent persons appointed by the manager (ss. 63 to 66).

**1044.** Where on account of the presence of gas, or for any other cause, a mine or place is found to be dangerous, every workman must be withdrawn, and an inspection made by a fireman, who must record a full report. Except for exploration, or to remove the danger, no workman may be readmitted until the place has been reported free from danger. The question whether a place is dangerous is a question of fact in each case, but where there is  $2\frac{1}{2}$  per cent. of inflammable gas present in the general body of the air (or  $1\frac{1}{4}$  per cent. where naked lights are used) a place is to be deemed dangerous. The men must be withdrawn when the percentage mentioned is exceeded, even where they are at the moment dealing with another danger, such as an outbreak of fire.<sup>1</sup> Where a workman discovers inflammable gas in his working place, he must at once withdraw and inform the fireman (s. 67).

SUBSECTION (13).—*Additional Regulations for Sinking.*

**1045.** The provisions of the Act, and of Orders and Regulations made under it, apply to mine shafts in the course of being sunk (s. 122). Additional Regulations which are applicable in such cases are, however, provided<sup>2</sup> with regard to daily examination of the shaft, and of all gear by which persons or materials are raised or lowered. Certain precautions must be observed in the placing and construction of cradles or platforms. When work is done by night, the shaft-top must be efficiently lighted. The chargeman (who corresponds to the fireman and onsetter)

<sup>1</sup> *Wing v. Pickering*, [1925] 2 K.B. 777.

<sup>2</sup> Regulations 172 to 190 of S.R. & O. 1913, No. 748.

during his shift is to have entire charge of operations in the shaft-bottom. He must examine the shaft immediately before the descent of the shift, and must be the last man to ride at the end of the shift. It is his duty to see that the kibble is properly loaded, so that nothing will fall off when it is being raised to the surface. When workmen have been withdrawn for shot-firing or other purposes, no one may descend until the chargeman, after examination, has reported the shaft safe. The winding engineman must observe certain specified precautions when raising or lowering the kibble. When tools or materials are being lowered, the banksman must see that the kibble is properly loaded. It is his duty also to see that the shaft-top and landing edge are kept free from loose material. Special signals are prescribed, and no one may give signals except the banksman and chargeman, officials of the mine, and persons specially authorised.

#### SUBSECTION (14).—*Miscellaneous Safety Provisions.*

**1046.** Workings approaching within 40 yards of a place likely to contain an accumulation of water or liquid matter, or of disused workings, must not exceed 8 feet in width, and must be provided with proper boreholes<sup>1</sup> (s. 68). Inflammable materials below ground must be stored in fireproof receptacles, and must not be used in the construction of an engine-house below ground or, in the case of new mines, in the construction of the pithead frame or roof over the pithead. Fire extinguishers must be provided where inflammable material is stored or used. A barometer, thermometer, and two hygrometers must be kept in conspicuous positions in each mine, and readings taken from them and recorded (ss. 69 to 71).

**1047.** No person shall wilfully damage or remove any apparatus provided in a mine in compliance with the Act. Everyone must observe such directions with respect to working as may be given to him with a view to safety. In principle no distinction can be drawn between a prohibition founded on the statute and one imposed by the employer, although the former is more notorious and cannot be waived.<sup>2</sup> Inexperienced persons are prohibited from working alone as coal-getters until they have had two years' experience under supervision (ss. 72 to 74).

#### SECTION 6.—PROVISIONS AS TO HEALTH.

**1048.** Where a two-thirds majority of the underground workmen and surface workmen handling coal in any mine desire facilities for taking baths and drying clothes, the owner is bound to provide such accommodation, provided that the total cost of maintenance does not exceed three-pence per week for each workman liable to contribute. If provided, every workman has to contribute his share of half the cost of maintenance, not exceeding three half-pence per man per week, which may be deducted

<sup>1</sup> *Abbot v. Bromley*, [1924] 2 K.B. 684.

<sup>2</sup> *Donnelly v. Moore & Co.*, 1921 S.C. (H.L.) 41, at pp. 46, 48, 49.

from his wages. The management of the bath accommodation is entrusted to a committee appointed one-half by the owner and one-half by the workmen. The section does not apply to mines employing less than one hundred workmen, or to mines likely to be worked out in less than ten years (s. 77). Nor does it apply where baths are provided out of the welfare fund or the royalties welfare levy.<sup>1</sup>

**1049.** Where mechanical drills are used for drilling in ganister or other highly silicious rock, which is likely to give rise to fibroid phthisis, a water jet or spray must be used to prevent the escape of dust into the air. Non-observance of this provision constitutes an offence under the Act, for which not only the offender is liable but also the owner, agent, and manager of the mine, each being liable unless he proves that he had taken all reasonable means to ensure compliance (s. 78).

**1050.** The Act also provides for the notification of certain diseases to be specified in an Order by the Secretary of State (s. 79). No Order has, however, yet been made under the section.

**1051.** The General Regulations require that a sufficient supply of suitable sanitary conveniences shall be provided, both on the surface and below ground near the pit bottom and on the main roads. They must comply with certain detailed requirements.<sup>2</sup> General Regulations have been made under s. 77 dealing with bathing accommodation. These specify that spray or douche baths, in the proportion of one to every six persons in the largest shift, shall be provided. The constructional details of the bathing-cabinets, the temperature and chemical standard of the water, are laid down. The powers and duties of the Committee of Management are detailed.<sup>3</sup> Provision is also made for arbitration in cases in which there is disagreement between the owner and the workmen as to the estimated cost of maintenance.<sup>4</sup>

**1052.** Special General Regulations have been made for ganister mines. These provide that a jet of water shall be directed on to the cutting edge of every rock drill worked by mechanical power, and a stream of water on to the cutting edge of every drill operated by manual labour, while working. Special intervals are prescribed which must elapse after shot-firing. No stone may be taken down, moved, or worked without being watered. Special notices prohibiting spitting must be displayed. There must also be efficient ventilation.<sup>5</sup>

## SECTION 7.—PROVISIONS AS TO ACCIDENTS AND INSPECTION.

### SUBSECTION (1).—*Notices of Accidents.*

**1053.** The Act provides that in cases of serious accident, whether below or above ground, notice must be sent to the inspector of the

<sup>1</sup> Mining Industry Act, 1926, s. 17 (3).

<sup>2</sup> Regulations 106 to 112 of S.R. & O. 1913, No. 748.

<sup>3</sup> S.R. & O. 1913, No. 950.

<sup>4</sup> S.R. & O. 1913, No. 955.

<sup>5</sup> S.R. & O. 1920, No. 873.



division forthwith, and also (in cases causing loss of life or serious personal injury) to a person nominated for the purpose by the workmen. Such notice (which must be in writing) is required in cases in which the accident (a) causes loss of life; (b) causes fracture of the head, fracture or dislocation of a limb, or other serious personal injury; (c) is caused by an explosion, or by electricity, or by overwinding, and results in any personal injury whatever. Where there has been loss of life or serious personal injury, the place where the accident occurred must be left as it is until the inspector visits the place, or until the expiry of three days after the notice has been sent, except in cases in which doing so would constitute a danger, or would impede the working of the mine. Where personal injury incurred in an accident results in death, notice in writing of the death must be sent within twenty-four hours to the inspector of the division. Even in cases where no personal injury or disablement is caused, the Secretary of State may by order require notice of accident to be given in certain classes of cases (ss. 80, 81).

1054. The provisions as regards notice have been thus extended by an Order made under the Notice of Accidents Act, 1906,<sup>1</sup> which, however, by virtue of s. 126 (a) takes effect as if made under this Act. Notice is therefore required in all cases of ignition of gas or dust below ground, fire below ground, breakage of gear by which men are raised or lowered, overwinding while men are being raised or lowered, and cases of inrush of water from old workings.<sup>2</sup>

#### SUBSECTION (2).—*Reports and Investigations.*

1055. The Secretary of State may, where an accident in a mine has caused loss of life or personal injury to any person, direct an inspector to make a special report, and may publish such report. He may also, where he considers it necessary, order a formal investigation of any accident whatever. Such an investigation is held by a competent person, with or without assessors, in open Court. The Court has the powers of a Court of summary jurisdiction, as well as all the powers of an inspector under the Act, and can require the attendance of any persons and the production of any documents it may require. Witnesses are allowed the usual expenses. The Court reports to the Secretary of State, stating the causes and circumstances of the accident, and adding any observations which it thinks right to make, and the report is laid before Parliament. The expenses incurred are borne by the Secretary of State (ss. 82, 83).

#### SUBSECTION (3).—*Rescue and Ambulances.*

1056. General Regulations may require provision to be made at all mines, or any class of mines, for (a) the maintenance of appliances for use

<sup>1</sup> 6 Edw. VII. c. 53.

<sup>2</sup> S.R. & O. 1906, No. 934.



in rescue work, and the formation and training of rescue brigades; (b) the maintenance of ambulance appliances and the training of men in rescue work (s. 85). The General Regulations made under this section apply to all mines in which coal is worked, and to oil shale mines. After an explosion or a fire, no one may enter the mine for the purpose of rescue work without the authority of the principal official of the mine present at the surface.

**1057.** Competent rescue brigades are to be organised at every mine, on a scale varying from one brigade, where the number of underground workers is two hundred and fifty or less, to four brigades where they number more than one thousand, except where (a) the mine is served by a central rescue station maintaining a permanent rescue corps, situated within 10 miles of and in telephonic communication with it; (b) the Board of Trade have exempted a mine employing less than one hundred persons underground, so situated that it is impracticable for it to be served from a central rescue station. The qualifications, training, and equipment of the brigades are provided for in detail. At every mine there must also be a room provided and maintained exclusively for rescue and aid purposes, under the charge of a qualified person appointed in writing by the manager. Uniform codes of rules for the guidance of persons employed in rescue work, and of signals used in rescue operations, are laid down.

**1058.** In every mine (except where conditions are excessively damp) there must be kept on the surface, and also in each fireman's district, a stretcher and a first-aid box, which must be inspected monthly. The manager must also, if possible, arrange for one man trained in first-aid to be in each fireman's district when more than twenty persons are employed there. There must also be kept at every mine a suitable ambulance carriage. Several mines, however, may, under certain conditions, be grouped together for the joint provision of an ambulance. The requirement also does not apply to mines employing less than one hundred persons, if exempted; nor to other mines in which arrangements have been made for obtaining the immediate use of an ambulance or a motor ambulance from a central rescue station, situated within ten miles and in telephonic communication with the mine.

**1059.** The rescue corps at the central rescue station consists of not less than six (in some cases eight) men, specially selected, certified medically fit, and holding a certificate of proficiency in first-aid. They are to be continuously employed and in constant readiness at the station. The Secretary of State, however, may, subject to such conditions as he may lay down, allow them to be engaged in mines in the immediate neighbourhood of the station. The training and equipment of these corps are specified in detail.<sup>1</sup>

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<sup>1</sup> Part IV. of S.R. & O. 1913, No. 748 (Regulations 138 to 149), as amended by S.R. & O. 1914, No. 710, and Part III. of S.R. & O. 1920, No. 1423 (Regulations 11 to 27).

SUBSECTION (4).—*Inspectors.*

**1060.** The Secretary of State has power to appoint inspectors and to assign to them their duties. No inspector may be a partner, or have any interest, direct or indirect, in any mine in the United Kingdom, whether the mine is one to which the Act applies or not. Inspectors are empowered to make such examination and inquiry as may be necessary to ascertain whether the statutory provisions are being complied with above or below ground. They may enter any part of a mine at all reasonable times for that purpose, so long as they do not obstruct the working of the mine. They may examine into the condition of any mine and into all matters connected with the safety of the persons employed in or about a mine, or with the care and treatment of animals used in a mine. The owner must furnish the means necessary for the inspector's examinations, and it is an offence under the Act to delay or obstruct an inspector in the execution of his duty, or to fail to comply with his requisitions.

**1061.** Where an inspector finds anything dangerous or defective in a mine, he may give notice in writing specifying the defect, and requiring it to be remedied. Where it cannot be remedied he may require the men to be withdrawn. He is not, however, entitled to say what the remedy should be, or to require any particular remedy to be adopted.<sup>1</sup> If the owner objects to remedy the matter, it is referred to arbitration. Where he does not object, but fails to remedy the matter within seven days, he is guilty of an offence under the Act. Every inspector and also the chief inspector, must make an annual report to the Secretary of State which is to be laid before both Houses of Parliament (ss. 97 to 100).

## SECTION 8.—EMPLOYMENT.

SUBSECTION (1).—*Below Ground.*

**1062.** No boy under the age of fourteen, and no girl or woman of any age, may be employed in any mine below ground. Where a boy is employed by someone other than the manager, *e.g.* a contractor, that person must report to the management that he is about to employ the boy before he causes the boy to be below ground (ss. 91 and 94 (2)). Boys between the ages of fourteen and eighteen may not be employed below ground at night. The term "night" is defined as a period of at least eleven consecutive hours, including the interval between 10 p.m. and 5 a.m. In coal and lignite mines, however, work may be carried on during the prohibited night interval if there be an interval of ordinarily fifteen hours, and in no case less than thirteen hours, between two periods of work. Further, boys between the ages of sixteen and eighteen years may be employed on night work in cases of emergencies which could not

<sup>1</sup> *Secretary of State v. Fletcher*, 1887, 18 Q.B.D. 339.

have been controlled or foreseen, are not of a periodical character, and interfere with the normal working of the undertaking.<sup>1</sup>

SUBSECTION (2).—*Hours of Work below Ground.*

**1063.** The Act of 1908 provided that no workman shall be below ground for the purpose of his work, or of going to and from his work, for more than eight hours during any consecutive twenty-four hours. This period was reduced to seven hours by the 1919 Act. The further limitation has, however, now been removed, and the period of eight hours restored by the provisions of the Coal Mines' Act, 1926.<sup>2</sup> The Act continues in force for five years from 8th July 1926.

**1064.** The Act of 1908 applies to all persons employed in a mine below ground, with the exception of officials of the mine (other than firemen, examiners, and deputies), mechanics or horse-keepers, and persons engaged solely in surveying or measuring. Firemen, pump-minders, fanmen, and furnacemen may, however, be below ground for nine hours. Repairing shifts may recommence work early on Saturday, before the prescribed twenty-four hours have elapsed, so as to avoid work on Sunday. Similarly, where continuous work is necessary for sinking a pit or driving a cross-measure drift, a relaxation of the provisions of the Act is permitted upon conditions. The eight hours are calculated from the time when the last workman in a shift leaves the surface to the time when the first workman in the shift returns to the surface.<sup>3</sup> The limitation also does not apply to workmen who are below ground in order to render assistance in the case of accidents, to meet any apprehended danger, to deal with an emergency, or to complete work urgently necessary to avoid serious interference with the ordinary work of the mine. Nor does it apply in the South Staffordshire District to stallmen taking down top coal in square or wide work, so long as their presence near the stall is necessary to ensure safety. In order to justify a prolongation of the hours, the danger which is being met must be due to some abnormal and exceptionally serious occurrence.<sup>4</sup> The management must fix the times at which the lowering and raising of shifts is to begin and end, subject to approval by the inspector (1908 Act, s. 1, as amended by the 1919 Act and the Coal Mines Act, 1926). The operation of the 1908 Act may, in the event of war or great emergency, or in the event of grave economic disturbance, be suspended by Order in Council (1908 Act, s. 4).

**1065.** It is the duty of the management to make such regulations as may be necessary to secure compliance with these provisions; to provide the necessary means for raising men within the time prescribed; to make all arrangements necessary for the observance of the times fixed for lowering and raising shifts; and to appoint some person to direct at the

<sup>1</sup> Employment of Women, Young Persons, and Children Act, 1920 (10 & 11 Geo. V. c. 65).

<sup>2</sup> 16 & 17 Geo. V. c. 17.

<sup>3</sup> *Roger v. Stevenson*, 1913 S.C. (J.) 30.

<sup>4</sup> *Thorneycroft v. Archibald*, 1913 S.C. (J.) 45.



pit-head the lowering and raising of men. A register must also be kept of the times at which men are lowered and raised, and of the cases in which any man exceeds the permitted hours. A copy of the Regulations must be supplied *gratis* to every workman. The underground workmen may at their own cost appoint a time-checker to be at the pit-head in order to observe the times of lowering and raising. He may be a check-weigher, and is appointed in the same manner. In making such an appointment the statutory requisites must be strictly observed <sup>1</sup> (1908 Act, ss. 1, 2, and 6).

**1036.** Penalties are imposed on any person who contravenes or fails to comply with the provisions of the Act, or who connives at any such contravention. Connivance is a question of fact, and is not to be inferred merely from a failure to prosecute or dismiss offenders.<sup>2</sup> If a workman is below ground for longer than the permitted period, he is to be deemed to have been below ground in contravention of the Act unless the contrary is proved. A workman, however, will not be held guilty if he proves that he was not at fault, but that there were no means available to enable him to return to the surface in time (1908 Act, s. 7).

#### SUBSECTION (3).—*Above Ground.*

**1067.** No boy or girl under fourteen years of age may be employed above ground in connection with a mine. No boy between the ages of fourteen and sixteen, and no girl or woman, may be employed on Sunday. On week-days they may be employed only during the period of employment shewn in the prescribed form of notice which must be posted up at the mine. The period of employment must not begin before 5 a.m. nor end later than 9 p.m. (on Saturdays 2 p.m.). It must not exceed ten hours in any day, excluding the meal intervals, and the total for the whole of the week must not exceed fifty-four hours. A period of twelve hours must elapse between the end of the employment on one day, and its beginning the next day. They may not be employed continuously for more than five hours without a meal interval of at least half an hour; and where they are employed for more than eight hours on any day, the meal intervals altogether must amount to one hour and a half. The meal intervals must be specified in the notice posted up at the mine. Different periods of employment and meal intervals may be fixed for different persons and different days, and changes may be made in either, but not more frequently than once a quarter.

**1068.** Boys, girls, and women must not be employed in moving railway waggons, or in lifting, carrying, or moving anything so heavy as to be likely to cause them injury. Boys between the ages of fourteen and eighteen must not be employed at night (*i.e.* for a period of eleven consecutive hours including the interval between 10 p.m. and 5 a.m.) except

<sup>1</sup> *Addie & Sons' Collieries v. Sullivan*, 1916 S.C. 770.

<sup>2</sup> *Gregory v. Walker*, 1912, 77 J.P. 55.



in coal and lignite mines at which an interval of ordinarily fifteen hours, and in no case of less than thirteen hours, separates two periods of work. Young persons between the ages of sixteen and eighteen may also be employed at night in unforeseen, non-recurring cases of emergency (ss. 92 and 93, as amended by the Employment of Women, Young Persons, and Children Act, 1920).<sup>1</sup>

**1069.** A register, in prescribed form, must be kept at every mine shewing the name, age, residence, and date of first employment of each boy employed below ground, and of each boy, girl, and woman employed above ground (s. 94). It is an offence for any person to make false representations as to age in order to secure employment either for himself or for any boy or girl of whom he is the parent or guardian (s. 102 (7)).

**1070.** The hours of employment of winding enginemen have also been limited to eight hours in any one day as from 30th June 1913, and particulars regarding their hours of employment must be recorded (s. 57 (3)). Various relaxations from this requirement, upon certain conditions, are permitted by General Regulations in order to meet cases where work is carried on by a succession of shifts, cases of illness and accident, and other exceptional circumstances.<sup>2</sup>

## SECTION 9.—WAGES.

### SUBSECTION (1).—*Payment by Weight.*

**1071.** The subject of payment by weight is dealt with in the un-repealed provisions of the Coal Mines Regulation Act, 1887, which apply to the same mines as the Act of 1911.

**1072.** Where the amount of wages paid to those employed in a mine depends on the amount of mineral gotten by them, the wage-earners are to be paid according to the actual weight gotten by them of the mineral contracted to be gotten. For this purpose the mineral gotten by them is to be truly weighed at a place as near to the pit mouth as is reasonably practicable. The management may agree with those employed that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten (*i.e.* "dirt") sent out of the mine therewith. They may also agree upon deductions in respect of tubs which have been improperly filled by the getter of the mineral or by the person immediately employed by him.

**1073.** When it has been agreed that there shall be such a deduction, the amount of the deduction is to be made in one of three ways. It may be made in such special mode as may be agreed upon between the management and those employed in the mine. Or it may be made by someone appointed by the management, *i.e.* by the banksman or weigher. Or, where a check-weigher has been appointed by the employees, it may be made by the weigher and the check-weigher jointly. In case of a difference between them the matter is to be determined by a third person to be

<sup>1</sup> 10 & 11 Geo. V. c. 65.

<sup>2</sup> S.R. & O. 1913, No. 341.

agreed upon between the parties, or (failing agreement) to be appointed (in Scotland) by the sheriff of the county (1887 Act, s. 76). This section has, however, been repealed by the Act of 1911. It is doubtful, therefore, whether, apart from agreement, such a third person can be appointed, unless by an exercise of the *nobile officium*.<sup>1</sup> (1887 Act, s. 12).

**1074.** The section does not apply where the wages depend not directly on the weight of mineral gotten but on the amount of work done, as for instance payment at so much per yard excavated.<sup>2</sup> Payment must be made for all mineral of the kind contracted to be gotten (e.g. coal, ironstone, fireclay) of whatever size, and accordingly in the case of coal a deduction for small coal sent up is illegal.<sup>3</sup> The section distinguishes between what is to be weighed and what is to be paid for, as it directs that "the mineral gotten" shall be weighed, whereas payment is to be made for "the mineral contracted to be gotten." Everything sent up in the tub must therefore be weighed.<sup>1</sup> Where the mineral contracted to be gotten is coal, coal slack is not "dirt."<sup>4</sup> Deductions, however, may be made for improper filling, and it would probably be held that a tub containing an undue proportion of slack was improperly filled.<sup>5</sup> Overfilling is also a form of improper filling.<sup>6</sup> Deductions can only be made when the provisions as to the mode of determining them are complied with. But a miner who claims that deductions have been improperly made must establish what is due to him in respect of the mineral which he got in terms of his employment.<sup>1</sup>

**1075.** Special modes of deduction are intended to avoid expense and inconvenience where it would not be practicable to weigh the actual amount of mineral contracted to be gotten in each tub. The deduction is then based on the average amount of "dirt" to be expected in each tub according to practical experience, and an agreement for a uniform average deduction from the weight of the contents of each tub is valid.<sup>7</sup> An agreement that one tub in every twenty shall be tested, and that if the "dirt" in it exceeds a certain amount there shall be no payment in respect of the mineral in that tub, although payment is made on the gross weight of the other nineteen, is not valid.<sup>8</sup>

#### SUBSECTION (2).—*Check-weighers.*

**1076.** The persons employed who are paid according to weight may station at their own cost a check-weigher (or in his absence a deputy

<sup>1</sup> *Dobbie v. Coltness Iron Co.*, 1920 S.C. (H.L.) 121, at p. 137.

<sup>2</sup> *Humble v. Humphreys*, [1902] A.C. 207.

<sup>3</sup> *Brace v. Abercorn Colliery Co.*, [1891] 2 Q.B. 699.

<sup>4</sup> *Netherseal Colliery Co. v. Bourne*, 1889, 14 App. Cas. 228, overruling *Hynd v. Spowart*, 1884, 22 S.L.R. 702.

<sup>5</sup> *Kearney v. Whitehaven Colliery Co.*, [1893] 1 Q.B. 700, at pp. 708–09.

<sup>6</sup> *Atkinson v. Hastie*, 1894, 21 R. (J.) 62.

<sup>7</sup> *Ronaldson v. Mowat*, 1894, 21 R. (J.) 55.

<sup>8</sup> *Kearney v. Whitehaven Colliery Co.*, *supra*; *Ronaldson v. Mowat*, 1894, *supra*.

check-weigher) at each place appointed for the weighing of the mineral, in order that he may on their behalf check the weights and determine the deductions (1887 Act, s. 13 (1)). Persons employed by a contractor who is himself paid according to weight, even although he pays them otherwise, are included in the class of those paid according to weight so long as they are in charge of working places, or are holers, fillers, trammers, or brushers (1905 Act, s. 2 (2)). Where two pits formerly worked separately are under one manager, and are worked in common, they together constitute one mine for the purpose of these provisions.<sup>1</sup>

**1077.** The owner, agent, or manager must give proper facilities for the holding of a meeting for the purpose of appointing a check-weigher: and it is an offence for him to interfere with or improperly influence any such appointment (1894 Act, s. 1). The terms of the Act, however, apply only when the mine is a going concern, and not during a *bona fide* stoppage.<sup>2</sup> The person presiding at the meeting must make a statutory declaration, to be delivered forthwith to the owner, agent, or manager, in which he must state (a) that he presided at the meeting; (b) the name of the check-weigher appointed, and (c) that the appointment was made by a majority ascertained by ballot of the persons employed, if such was the case, or, if not, the names of those by whom or on whose behalf the appointment was made. Unless these requirements are strictly observed, the appointment is invalid.<sup>3</sup> Due notice of the meeting must be given by a notice at the pit-head to all entitled to take part in the appointment, and facilities must be given to them for voting (1905 Act, ss. 1 and 3). A check-weigher (or deputy check-weigher) appointed by a majority ascertained by ballot may not be removed by the persons employed except in the same manner (1905 Act, s. 1 (5)).

**1078.** The check-weigher is entitled to have every facility afforded to him for performing his duties and for testing the weighing machines, which are subject to the Weights and Measures Acts, and are to be examined thereunder; also for checking the taring of tubs and trams where necessary. These facilities include a shelter from the weather (which need not be artificially heated),<sup>4</sup> a desk or table, and a sufficient number of weights. The weigher must not interfere with the check-weigher or his weights. The check-weigher may give any workman an account of the mineral gotten by him, or information regarding matters within the scope of his duties. But he may not in any way impede or interrupt the working of the mine, or interfere with the weighing, or with any of the workmen, or with the management of the mine. His absence is not to interfere with the weighing or the determination of deductions, unless he had reasonable grounds to think that it was not to be proceeded with (1887 Act, ss. 13 and 15, and 1905 Act, s. 1).

**1079.** The duties of a check-weigher are strictly limited to the per-

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<sup>1</sup> *Shotts Iron Co. v. Brunton*, 1905, 13 S.L.T. 324.

<sup>2</sup> *Richards v. Duffryn Aberdare Colliery Co., Ltd.*, [1923] 2 Ch. 520.

<sup>3</sup> *Addie & Sons Collieries v. Sullivan*, 1916 S.C. 770.

<sup>4</sup> *Dalmellington Iron Co. v. M'Kenna*, 1912 S.C. (J.) 63.



formance of acts enjoined or permitted by the Acts. He may, however, also be appointed as a time-checker (1908 Act, s. 2) and as an inspector on behalf of the workmen (s. 16).<sup>1</sup> What constitutes interference is a question of fact in each case; but it is not limited to acts done by a check-weigher in virtue of, or in connection with, his office, or to acts done at the mine.<sup>2</sup> If the owner, agent, or manager desires the removal of a check-weigher on the ground that he has exceeded his duties or abused his position, he may complain to a Court of summary jurisdiction; and the Court may, after hearing parties, make a summary order for his removal (1887 Act, s. 13).

**1080.** In the case of two pits worked in common, under one manager, a check-weigher removed from one pit cannot be appointed to the other.<sup>3</sup> The check-weigher, although not employed by the owners, ceases to hold office when the miners are dismissed and the mine closed.<sup>4</sup> He is not reinstated unless reappointed when the mine reopens.

**1081.** Where a check-weigher has been appointed by the majority, ascertained by ballot, of the persons employed who are paid by weight, and has acted as such, he may recover the proportionate amount of his wages from any person for the time being so employed. This is so notwithstanding changes in the personnel since his appointment. In the case of persons employed by a contractor who is paid by weight, the contractor alone is responsible for their proportion of the check-weigher's wages.<sup>5</sup> Where the majority of the workmen liable for his wages, ascertained by ballot, agree to do so, the management of the mine may deduct the agreed contribution from their wages, and pay it over to the check-weigher notwithstanding the provisions of the Truck Acts, 1831 to 1896 (1887 Act, s. 14, and 1905 Act, s. 2).

#### SUBSECTION (3).—*Minimum Wage.*

**1082.** A minimum wage for workmen employed underground in coal mines was established by the Coal Mines (Minimum Wage) Act, 1912,<sup>6</sup> which came into operation on 29th March 1912. The duration of the Act was limited to three years, but it is maintained in force under the annual Expiring Laws Continuance Act. In addition to coal mines, the Act applies to mines of stratified ironstone. Its provisions apply to all persons employed underground, but not to those employed occasionally or casually, persons employed solely in surveying or measuring, mechanics, managers or under-managers, or any other officials whose position is specifically recognised as being different from that of a workman.

<sup>1</sup> *Date v. Gas Coal Colliery*, [1915] 2 K.B. 454.

<sup>2</sup> *Sykes v. Barraclough*, [1904] 2 K.B. 675.

<sup>3</sup> *Shotts Iron Co. v. Brunton*, 1905, 13 S.L.T. 324.

<sup>4</sup> *Merryton Coal Co. v. Anderson*, 1896, 18 R. 203; *Richards v. Duffryn Aberdare Colliery Co.*, [1923] 2 Ch. 520.

<sup>5</sup> The decision in *Sullivan v. Close*, 1898, 6 S.L.T. 2, is therefore no longer authoritative.

<sup>6</sup> 2 Geo. V. c. 2.



**1083.** It is an implied term of the contract of employment of those to whom the Act applies that the employer shall pay to the workman wages at not less than the minimum rate applicable to that workman as settled under the Act. Minimum rates of wages are settled for each district by the joint district board, consisting of representatives of employers and workmen with an independent chairman, which also makes district rules. The minimum rate need not, however, be paid in cases in which a workman is certified as being excluded from the provision by the district rules, or as having forfeited his right to the minimum wage because he has failed to comply with the conditions laid down by these rules regarding regularity or efficiency of work. The district rules lay down conditions for each district regarding exclusion from the right to the minimum wage in the case of aged workmen and infirm workmen (including those partially disabled by illness or accident), conditions regarding regularity and efficiency of work, and regarding the time for which payment is due where there is an interruption of work due to an emergency. The right to the minimum wage is to be forfeited where the conditions regarding regularity and efficiency of work are not complied with, unless the failure to do so is due to some cause over which the workman has no control. The district rules must also provide for the method of settling questions as to exclusion from, or forfeiture of the right to, the minimum wage (1912 Act, ss. 1 and 2).

**1084.** The payment of wages may be an element in considering whether the relation of employer or workman exists or not. But if the relationship in fact exists, the payment of wages need not be direct. Where a workman has been engaged by a colliery company, but works as "filler" to a contractor in charge of a stall, receiving his wages from the contractor and not directly from the colliery company, he is nevertheless employed by the company, who are liable (in case of a deficit) to make up his wage to the minimum. The obligation of the company to the workman is not discharged by their paying the contractor a sum which, if differently distributed, would provide the minimum wage for each worker in the stall.<sup>1</sup> It is not a condition precedent to a workman's right to sue for the minimum wage that he should produce a certificate that he is a workman to whom the Act applies.<sup>2</sup>

**1085.** By the Schedule to the Act, twenty-two districts are established. The joint district board in each district settles general minimum rates of wages and general district rules which are of general application throughout the district. They may, however, settle special minimum rates and special district rules to meet the special circumstances of any group or class of mines. They may also subdivide or conjoin districts where necessary (1912 Act, s. 2). They have no power to make a general district rule specifying the method by which the rate of a workman's actual daily earnings shall be ascertained. That must be

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<sup>1</sup> *Churm v. Dalton Main Colliery*, [1916] 1 A.C. 612; *Hooley v. Butterley Co.*, [1916] 2 A.C. 63.

<sup>2</sup> *Barwell v. Abercorn, etc. Coal Co.*, [1915] 2 K.B. 256.

left to the judge who has to determine the matter. They may, however, make a rule requiring immediate notice to be given by a workman where he claims that he was prevented by circumstances over which he had no control from doing sufficient work to earn his daily minimum rate, as that is a condition regarding regularity and efficiency of work.<sup>1</sup> There is no appeal from the award of a joint district board settling the minimum rate of wages, but the High Court can interpret an ambiguous award, and declare the rights of parties under it.<sup>2</sup>

**1086.** Minimum rates of wages and district rules settled under the Act remain in force until varied in accordance with the provisions of the Act. Variations, however, may be made at any time by agreement between the representatives of workmen and employers on the joint district board. Variations in the rates or rules may also be made after one year has elapsed since they were last settled, if application is made by any workmen or employers representative of a considerable body of opinion (1912 Act, s. 3). The applicants in that case are entitled to present their case to the joint district board independently, and not merely through the medium of their representatives on the board.<sup>3</sup>

**1087.** In cases in which there is no joint district board, the Board of Trade may appoint such person as they think fit in substitution for it; or they may appoint representatives for either workmen or employers where one side fails while the other side is willing to do so. Where the joint district board fails within three weeks to settle the first minimum rates or rules, or to deal with an application to vary, the chairman must deal with the matter in place of the joint district board. The period of three weeks may, however, be extended by agreement between the two sides, or by the chairman (1912 Act, s. 4).

#### SUBSECTION (4).—*Payment otherwise than by Weight.*

**1088.** In the case of mines employing not more than thirty persons underground, the Board of Trade may, on the joint representation of the owner or owners of any such mine or class of mines, and the persons employed therein, allow any method of payment other than that according to weight, subject to such conditions as they think fit. In that case the provisions of the Acts regarding payment by weight apply as if the term "weighing" included measuring and gauging (1887 Act, ss. 12 (3) and 13 (7)).

#### SUBSECTION (5).—*Time and Place of Payment.*

**1089.** Wages must not be paid to any person employed in or about a mine at any licensed premises or other house of entertainment, or any office, garden or place belonging thereto, or occupied therewith. The wages of such persons must be paid weekly, if a majority of them so

<sup>1</sup> *Davies v. Glamorgan Coal Co.*, [1914] 1 K.B. 674.

<sup>2</sup> *Lofthouse Colliery Co. v. Ogden*, [1913] 3 K.B. 120.

<sup>3</sup> *R. v. Judge Amphlett*, [1915] 2 K.B. 223.

desire; and each person must have delivered to him a statement containing detailed particulars of how the amount paid to him is arrived at. The mineowners are bound to furnish such particulars to a boy employed in the mine, who works under, and whose wages are handed to him by, a collier, known as a *butty*, who has received the amount from the mineowners.<sup>1</sup> (s. 96). The provisions of the Truck Acts, 1831 to 1896, apply to the wages of those employed in coal mines, with the exceptions already noted.

## SECTION 10.—REGULATIONS.

### SUBSECTION (1).—*Procedure.*

**1090.** Authority is given to the Secretary of State to make by order such general regulations for the conduct and guidance of persons acting in the management of mines, or employed therein, as may appear best calculated to prevent dangerous accidents, and to provide for the safety, health, convenience, and proper discipline of the persons employed in or about mines, and for the care of horses and animals used therein. Such regulations may vary or amend any of the safety provisions of the Act (contained in ss. 29 to 75), or the provisions relating to the care of animals (contained in the Third Schedule). The regulations may apply to all mines, or to any specified class of mines. They may also provide for the exemption of any specified class of mines, either absolutely or subject to conditions. An Order made under this section must be laid as soon as possible before both Houses of Parliament, and has effect as if enacted in the Act. The construction of such regulations will therefore be governed by the principles applicable to statutes. Orders made under the section may be revoked, altered, or added to by an Order made in the same manner as the original Order (s. 86).

**1091.** Before the Secretary of State makes an Order he must publish notice of the proposal to do so, and allow at least thirty days within which objections may be made by those affected. Objections must be in writing and must state the specific grounds of objection and the alterations asked for. The term "general objection" is applied to objections made by owners of mines employing not less than one-third of the men employed at the mines (or classes of mines) affected by the proposed Order, or by not less than one-third of the men so employed. After considering objections the Secretary of State may amend the draft Order, and the foregoing provisions apply to the amended draft in the same way as to the original draft. If a general objection is made to a draft Order, or an amended draft Order, within the required time, the objection must be referred to one of a panel of referees appointed under the Act, and in making the Order effect must be given to any variation which the referee may consider necessary or expedient. Objections other than general objections may be referred to a referee where the Secretary of State considers it desirable. He must refer (except in cases in which he considers

<sup>1</sup> *Simmonds v. Newport Abercarn Black Vein Steam Coal Co.*, [1921] 1 K.B. 616.  
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the objection frivolous) when the owners of mines in any separate area allege in their objection that the special conditions in that area make the proposed regulations inappropriate (Second Schedule, Part I.).

**1092.** Special regulations may be made for any mine upon the application of the inspector, or the owner, or a majority of the workmen employed in it. When approved they have effect, until revoked, as if they formed part of the general regulations applicable to that mine (s. 87). The draft special regulations proposed are submitted to the Secretary of State by the applicants. If he disapproves them, nothing further can be done in the matter. Before approving them, however, he must publish notice of the proposal to do so, as in the case of draft general regulations, and must consider objections made by those affected. He may in consequence require amendments to be made. If the owner or a majority of workmen feel aggrieved by the refusal of the Secretary of State to give effect to their objection, the matter must be referred to a referee, who may recommend variations which must be made before the regulations are approved (Second Schedule, Part II.).

#### SUBSECTION (2).—*Publication of Abstract of the Act and of Regulations.*

**1093.** In order to make known the provisions of the Act and the regulations of the mine, the Act imposes on owners and managers the duty of posting up in some conspicuous place near the mine, and when necessary renewing, a copy of the prescribed abstract of the Act and of all the regulations of the mine (s. 88 (1) (a)). It is an offence against the Act to pull down, injure, or deface such copies or any other notice or document posted up in pursuance of the Act or of the regulations (s. 121). In addition there must be supplied gratis to every workman at the commencement of his employment, and also whenever a new abstract is issued, a book containing such portions of the abstract and regulations as apply to the class of workman to which he belongs. Further copies must be supplied, at a price not exceeding one penny, to any workman on application at the pay-office (s. 88 (1) (b)). The regulations applicable to a mine consist of the general regulations, as supplemented or modified by the special regulations, and a copy certified by an inspector on request is to be *prima facie* evidence of their correctness (s. 89). Every copy of the regulations must be kept distinct from any regulations which depend only on the contract between the employer and employed (s. 88 (1) (c)).

### SECTION 11.—CONTRAVENTION OF THE ACT, PENALTIES, AND LEGAL PROCEEDINGS.

#### SUBSECTION (1).—*Offences.*

**1094.** As has already been noticed, regulations made under the Act, whether general or special, have effect as if enacted in the Act. The



penalties, therefore, for contravention or non-compliance with the provisions of the Act and of the regulations of the mine are the same. Any person who contravenes or does not comply with the safety provisions of the Act (contained in ss. 29 to 75) or with the regulations, is guilty of an offence against the Act; the owner, agent, and manager of the mine also are each guilty of an offence, unless each of them proves that he had taken all reasonable means to prevent the contravention or non-compliance by publishing, and to the best of his power enforcing, the provisions of the Act and of the regulations (ss. 75 and 90). Everyone employed in a mine who is guilty of any act or omission which, in the case of an owner, agent, or manager, would be an offence, is to be deemed to be guilty of an offence (s. 101 (1)).

**1095.** Where a mine is not managed in conformity with the Act the owner, agent, and manager are each to be deemed to be guilty of an offence under the Act (s. 101 (2)). Owners, agents, and managers will not, however, be liable for a breach of duty due to causes over which they had no control, and which it was impracticable for them to prevent (s. 102 (3) and (8)). They will be absolutely liable for any breach of an absolute statutory duty imposed directly on them, whatever they may have done to ensure compliance. But in the case of qualified duties an owner or agent who takes no part in the management will be exempt if he publishes the provisions, appoints competent officials, and provides funds to enable the manager to carry out his duties (ss. 75, 90, and 102 (1)). Special circumstances, as for instance where the manager cannot attend to his duties, or where the owner or agent is aware of special or unusual danger, may impose higher obligations on owners and agents.<sup>1</sup> Where a breach has been committed for which the manager accepts full responsibility, the owner and agent must also be convicted unless they have brought themselves within the exemptions contained in the latter part of ss. 75 and 90, and in s. 102 (1).<sup>2</sup>

The civil liability of owners and agents has already been discussed.<sup>3</sup>

**1096.** In proceedings brought against an owner or agent for an offence under the Act, it is no defence that a manager of the mine has been appointed in accordance with the Act. But in the case of proceedings in respect of an offence for which the owner, agent, and manager are each of them liable, the owner or agent is not liable if he proves (a) that he was not in the habit of taking, and did not take, part in the management of the mine, (b) that he had made all the financial and other provision necessary to enable the manager to carry out his duties, (c) that the offence was committed without his knowledge, consent, or connivance. These three conditions are cumulative, not alternative, and it is therefore necessary to prove all three in order to establish the defence.<sup>4</sup> The fact that an owner has consulted with the manager, on matters connected with which an offence which has been committed,

<sup>1</sup> *Black v. Fife Coal Co., Ltd.*, 1912 S.C. (H.L.) 33.

<sup>2</sup> *Wing v. Dent Main Colliery Co.*, [1924] 2 K.B. 389.

<sup>3</sup> *Supra*, para. 979 *et seq.*

<sup>4</sup> *Charlton v. Jacob*, 1925, 41 T.L.R. 680.

may or may not, according to circumstances, amount to taking part in the management of the mine <sup>1</sup> (s. 102 (1) and (2)).

**1097.** In no case is the owner, agent, or manager of a mine liable for a penalty, or liable to an action of damages, if he proves that it was not reasonably practicable for him to avoid or prevent the breach of statutory duty (s. 102 (3) and (8)). Proceedings may be taken, in the first instance, against the manager for any offence for which he is liable. No proceedings can be instituted, however, against the owner, agent, manager or under-manager, before a Court of summary jurisdiction for offences other than those committed by them personally, except at the instance of an inspector or with the consent in writing of the Secretary of State. The statement of the Lord Advocate or his representative that such consent has been obtained is sufficient.<sup>2</sup> Where any person has been employed upon a representation, generally believed, that he fulfilled the conditions as to age, experience, or otherwise necessary for such employment, the owner, agent, and manager are exempted from any penalty should the representation prove to be untrue. The person making such a misrepresentation is guilty of an offence, including (in the case of boys and girls) parents or guardians who misrepresent the children's ages (s. 102 (4), (5), and (7)).

#### SUBSECTION (2).—*Penalties.*

**1098.** Except where special penalties are expressly provided, persons guilty of an offence are liable to a fine. In the case of owners, agents, managers, and under-managers the fine is not to exceed £20, and in the case of other persons £5, for each offence. In addition, if an inspector has given written notice of any such offence, the offender is liable to a further fine of £1 for each day on which the offence is continued after the notice has been given (s. 101 (3)). There may be cases in which the facts arising out of one occurrence may give rise to two separate charges, on which a cumulative conviction may follow, but such cases are not easily imagined.<sup>3</sup> In the case of fines for neglecting to send notice of an accident, or for offences which have resulted in loss of life or personal injury, the Secretary of State may (if he thinks fit) order the fine to be distributed amongst those injured or their relatives. Otherwise all fines are paid into the Exchequer (s. 105).

**1099.** The Act also empowers the Court which tries the case to impose imprisonment, with or without hard labour, for a period not exceeding three months instead of a fine in cases in which the offence was likely to endanger the safety of the persons employed, or to cause serious personal injury or a dangerous accident, and was committed wilfully by the accused personally (s. 101 (4)).

<sup>1</sup> *Atkinson v. Lewis Merthyr Collieries*, [1916] 1 K.B. 363; *Archibald v. Plean Colliery Co.*, 1924 S.C. (J.) 77.

<sup>2</sup> *Stevenson v. Roger*, 1915 S.C. (J.) 24.

<sup>3</sup> *Moore & Co. v. Wilson*, 1903, 5 F. (J.) 88.

**1100.** Even where no other proceedings have been taken, the Court of Session may on the application of the Lord Advocate prohibit by interdict the working of any mine or part of a mine in which contravention of the provisions of the Act or of the general regulations appears calculated to endanger the safety of persons employed therein. Written notice must, however, be given to the owner, agent, or manager ten days before such interdict is applied for. A Court of summary jurisdiction may, on complaint by an inspector, prohibit the use of machinery or plant which is dangerous to life or limb; or, if it is capable of repair or alteration, may prohibit its use until repaired or altered (ss. 107, 108).

**1101.** Certain offences are specially declared to be misdemeanours, punishable with imprisonment, with or without hard labour, for a term not exceeding two years. Such are, the forgery of certificates of competency, or the uttering or using of forged certificates; making false declarations or statements (or uttering or using the same) so as to obtain employment as a manager or under-manager, or in any other capacity, or to obtain a certificate of competency; knowingly making any false statement in any report or entry required to be recorded in a book kept at the mine (s. 28).

#### SUBSECTION (3).—*Prosecutions.*

**1102.** With the exception of the misdemeanours just referred to, offences may be prosecuted and fines recovered in the manner directed by the Summary Jurisdiction Acts. It is sufficient to allege that the mine is a mine within the meaning of the Act. Either party may require the Court to cause minutes of the evidence to be taken and preserved. Persons connected with or employed in a mine, or their near relatives, may not act as members of such a Court of summary jurisdiction, unless with the consent of both parties to the case (s. 103). The duty is laid on owners, agents, and managers of reporting to the inspector within twenty-one days the result of any proceedings taken by them against anyone employed in or about the mine (s. 106).

### SECTION 12.—MISCELLANEOUS PROVISIONS.

#### SUBSECTION (1).—*Care of Horses and other Animals.*

**1103.** The Act lays down regulations concerning the care and treatment of horses, and other animals in mines, which are to be observed in every mine. Special inspectors are appointed to enforce these provisions, and they have the same powers, and are subject to the same restrictions, as inspectors of mines under the Act (s. 109).

**1104.** The regulations themselves are contained in the Third Schedule to the Act, which has been supplemented by subsequent Orders. No horse may be taken underground until it is four years old, and has been tested by a veterinary surgeon and certified to be free from glanders.<sup>1</sup>

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<sup>1</sup> See S.R. & O. 1923, No. 313, for conditions of test.



Except in cases of necessity arising through accident, no horse, unless injured or ill, is to be taken into or out of a mine on a bogie or other carriage. This, however, does not prevent the lowering of horses through a shaft or by way of an incline where the gradient is too steep for the animal to walk with safety.<sup>1</sup> Elaborate provision is also made for the stabling, feeding, and care of horses while underground, and for the reporting of any injury to them, and the prevention of their working in a condition of sickness or injury. The manager must either himself, or through some competent person specially appointed, exercise personal supervision sufficient to ensure that the provisions regarding horses are observed. Ponies, mules, and donkeys are included in the term "horses." The annual return made to the inspector of the division must include a statement shewing the number of horses used, the changes during the year due to accident or disease, and the number of cases of injury or ill-treatment reported to the manager (Third Schedule).

#### SUBSECTION (2).—*Railway Sidings.*

**1105.** For the purpose of returns and notifications of accidents, and general and special regulations, railway lines and sidings used in connection with a mine are regarded as part of the mine so long as they do not form part of a railway used for the purpose of public traffic. The provisions regarding returns and notifications of accidents, however, apply only in the case of accidents to persons employed by the owner of the mine. Joint lines or joint sidings are for these purposes to be regarded as a separate mine, and each of the different owners will be liable to carry out the provisions (s. 111).

**1106.** As has already been noticed, the general regulations provide that trams run for the conveyance of workmen must be in the charge of a specially appointed man, and must not be boarded in motion. In addition, elaborate regulations have been made with regard to the provision, disposition, and working of the material and accessories necessary for the construction and working of the lines and traffic, for the regulation of the same and the safety of the employees.<sup>2</sup>

#### SUBSECTION (3).—*Powers of Secretary of State.*

**1107.** The Secretary of State may make Orders and grant exemptions, and may from time to time revoke or alter them, either unconditionally or subject to such conditions as he may see fit. They shall be signed by the Secretary of State, or an under-secretary, or assistant under-secretary (s. 114).

Power is also given to the Secretary of State to purchase and hold land in the United Kingdom for the purpose of experiments or tests relating to the safety or health of persons employed in mines (s. 115).

<sup>1</sup> S.R. & O. 1922, No. 113.

<sup>2</sup> Regulations 23 and 150-71 of S.R. & O. 1913, No. 748.



SUBSECTION (4).—*Settlement of Disputes.*

**1108.** Several sections of the Act and various general regulations provide that questions arising thereunder are to be settled in the manner provided by the Act for settling disputes. Such cases are to be referred to one referee from a panel appointed by a Reference Committee consisting of the Lord Chief Justice of England, the Lord President of the Court of Session, and one person specially qualified by eminence in mining knowledge selected by these two. The referee is chosen, and the procedure and costs of the reference are regulated, by rules made by the Reference Committee. The decision of the referee is final. No matter, however, is to be so referred unless the person objecting or refusing compliance has served notice on the other party within the prescribed time and in the prescribed manner (ss. 116 and 117).

**1109.** The notice required by s. 116 must be served within fourteen days after receipt of the order or notice to which the party serving objects, or with which he refuses to comply. It must be in writing and must state the grounds of objection or of refusal, and must be sent to the Secretary of State or the inspector (as the case may be) by registered post.<sup>1</sup>

**1110.** The procedure before referees is in accordance with the Coal Mines (Reference) Rules, 1913.<sup>2</sup> The Secretary of State must send to the Reference Committee a statement of the matter for reference, and a copy of the proposed regulations with the objections, if any. The Reference Committee then select the referee, furnish him with copies of the documents, and inform the parties. The Reference Committee may appoint an assessor with legal or special knowledge if the referee so desires. The referee fixes a time for the reference, not less than three days or more than twenty-one days from his appointment, and serves notice by post on the parties of the time and place so fixed. The hearing, unless otherwise ordered, is in private. Parties may appear in person or by counsel or agent. Where the reference relates to proposed general regulations, the referee may allow any substantial number of owners or workmen to attend and take part, even though they have not made a general objection, unless he considers their application frivolous. In the case of a reference regarding special regulations, he is to allow an owner or majority of workmen who have not made objection to attend and take part, if they so apply. In such cases he may require the applicants to appear by counsel or agent. The referee may inspect the mine and adjourn the hearing. The referee must furnish copies of his decision to the parties as soon as possible.

**1111.** The Reference Committee may, where necessary, revoke the reference and appoint another referee. In references regarding objections to general regulations, the referee's remuneration is fifteen guineas a day, in other cases ten guineas a day, with travelling expenses. Special

<sup>1</sup> S.R. & O. 1912, No. 1539.

<sup>2</sup> S.R. & O. 1913, No. 10.

fees, however, may be authorised. Assessors receive ten guineas a day, with travelling expenses. The costs of the proceedings are to be payable in such manner as the referee may direct.

SUBSECTION (5).—*Procedure for Ascertaining and Certifying Views of Workmen.*

1112. The Secretary of State is empowered to make rules prescribing the procedure to be observed for ascertaining and certifying the views of the workmen, where those views are required to be ascertained (s. 118). In several cases this must be done by ballot, viz. in questions of provision of baths, discontinuance of baths, election of workmen's representatives on the Committee of Management of Baths, withdrawal of a representation desiring the provision of baths, and the proposal of special regulations by workmen. In other cases, where a ballot is not expressly required, the workmen's views must be ascertained by a shew of hands at a meeting of workmen entitled to vote, of which three days' notice must be given by a notice posted at the pit-head. A certificate stating the result of the voting, and signed by the person presiding at the meeting, must forthwith be delivered to the owner, agent, or manager of the mine. If within seven days of the meeting the owner, agent, or manager, or one-tenth of the workmen by signed notice demand a ballot, or if the Secretary of State directs that a ballot shall be taken, a ballot must be taken.

1113. In cases where a ballot is necessary, the manager must within twenty-one days prepare a register of voters. This must be open to inspection by the workmen and the check-weigher for a week before the ballot. The ballot is carried out by a representative of the owner, and the check-weigher or other representative of the workmen, on the second Saturday after completion of the register, or earlier if they so agree. They may agree upon the hours during which it is to be taken; otherwise it takes place between 8 a.m. and 8 p.m. Suitable notice must be posted by the representatives at the pit-head not less than three days before the ballot. The form of ballot-paper is prescribed, and arrangements must be made to ensure secrecy at the ballot. The ballot-papers are to be examined and counted by the representatives, and the result certified by them in duplicate in prescribed form. Disputes as to how any particular ballot-paper is to be counted are to be referred to the inspector, whose decision is final.<sup>1</sup>

SUBSECTION (6).—*Provisions as to Exemptions and Service of Notices.*

1114. Any exemption granted by an inspector must be in writing and signed by him. He may grant it either absolutely or subject to such

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<sup>1</sup> S.R. & O. 1912, No. 634.

conditions as he thinks fit, and it may be revoked at any time by the inspector for the time being (s. 119).

1115. All notices under the Act must be in writing. Notices and documents required to be sent by or to an inspector may be either delivered personally, or served and sent by post. To prove such service, it is sufficient to prove that the letter was properly addressed and put into the post (s. 121).

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## COCK-FIGHTING.

*See* ANIMALS.

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## CO-DEFENDER.

*See* DIVORCE; EXPENSES.

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## CO-DELINQUENTS.

*See* PRACTICE AND PROCEDURE; NEGLIGENCE;  
REPARATION.

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## CODEx.

## CODICILLI.

*See* ROMAN LAW.

## CODICIL.

*See* WILL.

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## COGNATE.

*See* JUDICIAL FACTOR; KINSHIP; SUCCESSION; TUTORS  
AND CURATORS.

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## COGNITION OF THE INSANE.

*See* BRIEVE; INSANITY AND LUNACY

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## COGNITION AND SALE.

*See* ACTION.

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## COGNITION AND SASINE.

*See* BURGAGE.

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## COGNITIONIS CAUSA.

*See* DECREE.



## COHABITATION.

*See* DIVORCE; JUDICIAL SEPARATION; MARRIAGE.

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## COIN.

*See* MONEY.

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## COINING.

*See* CRIME.

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## COLLABORATEUR.

*See* NEGLIGENCE.

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## COLLATERAL SECURITY.

*See* BILLS OF EXCHANGE; CAUTIONARY OBLIGATIONS;  
SEQUESTRATION.

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## COLLATERAL SUCCESSION.

*See* CONQUEST; KINSHIP; SUCCESSION.

# COLLATION.

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## INTRODUCTORY.

1116. The common law, on feudal principle, adopts primogeniture and an undivided estate as the rule of succession in heritage, but equal distribution among the next-of-kin as the rule of succession in moveables. Equity seeks to modify the hardships, thence in many cases arising, by the doctrine of collation, whereby, where the heir in heritage is also one of the next-of-kin, the whole succession, heritable and moveable, may be thrown into one mass, and equally shared among the next-of-kin, including the heir. This is termed *Collatio inter hæredes*, and applies both in the descending and the collateral line of succession.<sup>1</sup>

1117. A similar equitable interference takes place in the adjustment and distribution of the legitim fund; but it occurs in two different sets of circumstances. The heir may claim to participate in the legitim

GENERAL AUTHORITIES.—Stair, iii. 8, 45–49; Ersk. iii. 9, 3, 24, 25; Bankt. iii. 8, 17, 26; Bell, Com. (7th ed.), i. 95–99; Bell, Prin., ss. 1588–90, 1910–13; Bell, Law Dict. *collatio*; Balfour, Practicks, pp. 233, 234; Fraser, H. & W. 1033–57; McLaren, Wills, i. 150–69.

<sup>1</sup> *Chancellor v. Chancellor*, 1742, Mor. 2379; Elchies, Succession, No. 8.

where he is one of the children of the predecessor, in which case he must collate.<sup>1</sup> This is a branch of *Collatio inter hæredes*, and is treated as such. Or a child already substantially provided for may, notwithstanding, claim his share of legitim. A preference in favour of any individual child or children, by reason of advances made during the parent's life, is avoided by requiring such advances to be collated or brought *in computo*, if the child who has received them claims legitim, so as to equalise the division. This is termed *Collatio inter liberos*.

## PART I.—COLLATIO INTER HÆREDES.

### SECTION 1.—GENERAL PRINCIPLES.

1118. Collation *inter hæredes* is described sometimes as a privilege and sometimes as a burden, according to the standpoint of the speaker. The phraseology is not of practical importance. In either view the doctrine, according to the common law, is peculiar to a person who combines in his own person the characters of heir-at-law and one of several next-of-kin.<sup>2</sup> The common law has been to a certain extent modified by statute, as hereinafter explained.<sup>3</sup> Subject to this statutory modification, it is still a fundamental principle that the option which this form of collation confers is open only to one who possesses this dual capacity. As heir-at-law he is entitled to make exclusive claim to the heritage. Being also one of the next-of-kin he has a right, subject to condition, to share in the moveable estate.

1119. Where the heritable estate of the deceased is inconsiderable in proportion to the moveable, it may be in the interest of the heir-at-law to renounce his exclusive claim to the heritage. If he asserts his exclusive right and takes the heritage, he is barred from sharing in the moveable succession.<sup>4</sup> If he renounces his exclusive claim, the law allows him to collate or communicate the heritage with the other next-of-kin, who in their turn must collate the executry with him, so that the whole estate belonging to the deceased is thrown into one mass and distributed by equal parts among all of them.<sup>5</sup> It is not correct to say that the heir has no claim to the moveable succession, and is admitted thereto only by virtue of a special privilege. His exclusion from the executry, where it is operative, depends not upon his character as heir but upon the fact that there is heritage which he takes in that capacity. If he renounces his exclusive claim to heritage, he has the same right to share in moveables as have the other next-of-kin. Collation is not the source, but the condition, of the heir's right to share in the executry. The principle underlying the rule of collation *inter hæredes* is elaborately discussed in the opinions of the judges in the important case of *Waddell's Judicial Factor v. Waddell*.<sup>6</sup>

<sup>1</sup> M'Laren, Wills, i, 150; Bell, Prin., s. 1910.

<sup>2</sup> *Waddell's Judicial Factor v. Waddell*, 1924 S.C. 877, at p. 892.

<sup>3</sup> See paras. 1122-1126. <sup>4</sup> Stair, iii. 8, 48. <sup>5</sup> Ersk. iii. 9, 3. <sup>6</sup> 1924 S.C. 877.

## SECTION 2.—HEIR ONLY HAS OPTION TO COLLATE.

1120. The heir-at-law only has the option of collating the heritage.<sup>1</sup> This does not mean that the right of the heir is of so personal a nature as to be by law intransmissible.<sup>2</sup> What is meant is that while the heir has the option to collate the heritage with the next-of-kin, who in turn must collate the executry with him,<sup>3</sup> the next-of-kin have no corresponding privilege. If the heir claims the heritage, they cannot compel him to collate it with them. It would appear, however, that an heir may be compelled by his creditors to collate, where his doing so would increase the value of the succession.<sup>4</sup>

## SECTION 3.—WHERE HEIR IS SOLE NEXT-OF-KIN.

1121. If the heir-at-law is an only child, he is entitled, in addition to taking the heritage, to claim legitim as against his father's testamentary disponees.<sup>5</sup> If there were other children, and he were to succeed to heritage which he refused to collate, he would be excluded from legitim.<sup>6</sup> Where the younger children have renounced their legitim, the heir, if he be not included in the renunciation, is entitled to the whole legitim fund. The legal effect of renunciation of legitim during the parent's lifetime is the same as if the renouncing child had predeceased. If there is no other child who has right to participate in legitim, there is no one with whom the heir is bound to collate. Accordingly in the case supposed, of all the younger children having renounced, the heir may claim the whole legitim in addition to what he succeeds to as heir.<sup>7</sup> If the heir be also the sole next-of-kin, he is entitled on intestacy to claim both legitim and dead's part. As he is both heir and executor, there is no place for collation.<sup>8</sup> He is not bound to collate the heritage with the relict, the *jus relictæ* fund not being diminished by reason of his claiming moveable succession.<sup>9</sup>

## SECTION 4.—STATUTORY RULES AS TO COLLATION.

1122. The rule of the common law was that an heir-at-law who was not also one of the next-of-kin had no right to share in the distribution of the personal estate. Thus uncles and aunts entirely excluded a nephew, the son of their elder brother.<sup>10</sup> But a change was made by

<sup>1</sup> *Kennedy v. Kennedy*, 1843, 6 D. 40.

<sup>2</sup> See *infra*, para. 1141.

<sup>3</sup> *Ersk.* iii. 9, 3.

<sup>4</sup> *Bell, Com.*, i. 99; *M'Laren, Wills*, i. 150.

<sup>5</sup> *Justice*, 1737, *Mor.* 8166; *Howden v. Crighton*, 1821, 1 S. 16.

<sup>6</sup> *M. of Breadalbane v. M. of Chandos*, 1836, 14 S. 309; 2 Sh. & M'L. 377.

<sup>7</sup> *Baron Paumure v. Crokat*, 1856, 18 D. 703. The case of *Martin v. Agnew*, 1749, *Mor.* 8167, is not now regarded as a reliable authority.

<sup>8</sup> *Anstruther v. Anstruther*, 1836, 14 S. 272, at p. 282.

<sup>9</sup> *Trotter v. Rothead*, 1681, *Mor.* 2375; *Balmain v. Glenfarquhar*, 1719, *Mor.* 2378.

<sup>10</sup> *McCaw v. McCaws*, 1787, *Mor.* 2383, correcting the rule laid down in *Ersk.* iii. 9, 3; *Anstruther v. Anstruther*, 1836, 14 S. 272, at p. 282.



s. 2 of the Intestate Moveable Succession (Scotland) Act, 1855.<sup>1</sup> In order to realise the precise effect of this enactment, it is necessary first to have regard to the change made by the same statute in introducing the principle of representation in moveable succession.

**1123.** Sec. 1 of the Act provided that where any person who would have been among the next-of-kin shall have predeceased the intestate, his issue shall have right to the share of moveable estate which he would have taken. This is made subject to the proviso that no representation shall be admitted among collaterals after brothers' and sisters' descendants. For example, cousins of an intestate would succeed to the personal estate, to the exclusion of issue of a predeceasing cousin. Sec. 2 then provided that where the person predeceasing, if he had survived, would have been the heir in heritage of a person leaving heritable as well as moveable estate, his child, being the heir in heritage of the intestate, shall be entitled to collate the heritage to the effect of claiming, for himself and any other issue of the predeceaser, the share of the moveable estate which might have been claimed by the predeceaser upon collation. In a case which was heard before seven judges,<sup>2</sup> it was held that s. 2 is not an independent enactment: it must be read subject to the proviso contained in s. 1. The rule of collation operates under s. 2 only in the case of a succession where, by virtue of s. 1, representation in moveables is admitted. Accordingly, as no representation is admitted in the succession of cousins, it was held that an heir in heritage, who was the son of a deceased cousin of the intestate, was not entitled, by collating the heritage, to share in the moveable estate along with a surviving cousin, who was the sole next-of-kin. It follows from this decision that s. 2 was wrongly held to be applicable in the case of *Innes v. Coghill*,<sup>3</sup> where the nearest of kin were cousins of the intestate, and the heir-at-law was the child of a predeceasing cousin.

**1124.** The kind of case to which s. 2 of the Act of 1855 applies may be illustrated by an example. An intestate who leaves both heritable and moveable estate is predeceased by his eldest son A., and survived by two younger children B. and C. The eldest son has left a son D. and a daughter E., who both survive the intestate. D. is the heir in heritage of the intestate. His father A., had he survived, would have been the heir in heritage. Accordingly D. is entitled, by collating the heritage, to obtain for himself and his sister E. a share of the moveable estate. The same section, after defining the circumstances in which an heir in heritage is entitled to exercise the option of collation, goes on to provide that "where, in the case aforesaid, the heir shall not collate" his brothers and sisters and their descendants shall have right to a share in the moveable estate equal in amount to the sum which would have been gained on collation. Thus in the case above figured, if D. elected not to

<sup>1</sup> 18 & 19 Vict. c. 23.

<sup>2</sup> *Colville's Judicial Factor v. Nicoll*, 1914 S.C. 62, overruling *Jamieson v. Walker*, 1896, 23 R. 547.

<sup>3</sup> 1897, 25 R. 23.

collate, E. would be entitled to receive out of the moveable succession a sum representing the difference between (a) the value of the share of the massed estate which could have been claimed on collation and (b) the value of the heritage.<sup>1</sup> It has been held that the words "where, in the case aforesaid, the heir shall not collate" refer to an heir who, having survived the intestate, had a right to collate but did not do so. They do not cover the case of a person who, if he had survived the intestate, would have been the heir in heritage, but who having predeceased never was in the position of having the option to collate.<sup>2</sup>

**1125.** The words in s. 2 which confer upon the actual heir the right to participate in the moveable estate are as follows: "Where the person predeceasing would have been the heir in heritage of an intestate . . . his child, being the heir in heritage of such intestate, shall be entitled to collate," etc. The word "child" here means immediate issue and does not include a grandchild.<sup>2</sup> On the other hand, it is to be noted that, by the terms of the Act, the child of the predeceasing heir who is given the right to participate in the moveable estate may state the claim not merely for himself but also for "the other issue of the predeceaser." It has been held that the words "other issue" are not limited to the predeceaser's immediate issue. Thus in the case of *Innes v. Coghill*<sup>3</sup> they were held to include a grandson of the predeceaser, being a nephew of the predeceaser's eldest son. The reasoning of this decision may still stand even although, as now ascertained, s. 2 was not applicable to the succession in question.

**1126.** A further point relative to collation, decided under s. 1 of the statute, may here be noted. An intestate who left a mixed estate was survived by sisters and the issue of predeceasing sisters, but was predeceased by A., his only brother. A. in turn was predeceased by his eldest son, and survived by five younger children. In this way A.'s grandson came to be the heir in heritage. The younger children of A. claimed to share in the moveable estate under s. 1. The provision of that section, so far as applicable to the case, is as follows: Where any person who, had he survived the intestate, would have been among his next-of-kin, shall have predeceased such intestate, his lawful children shall come in his place, and shall have right to the share of the moveable estate to which the parent of such children, if he had survived the intestate, would have been entitled. The predeceaser A. would have been the heir in heritage, and therefore could not have shared in the moveable estate except on condition of collating the heritage. This condition, owing to his predecease, he was never in a position to fulfil. It was accordingly held that his surviving children did not come within the terms of s. 1, and that they had no right to share in the moveable succession.<sup>2</sup>

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<sup>1</sup> *Innes v. Coghill*, 1897, 25 R. 23.

<sup>2</sup> *Adam's Exrx. v. Maxwell*, 1921 S.C. 418.

<sup>3</sup> 1897, 25 R. 23.

SECTION 5.—HEIR OF PROVISION *ALIOQUI SUCCESSURUS*.

**1127.** It is only the heir of line who is bound to collate, but his obligation to do so is not limited to the case where he succeeds *ab intestato*. An heir of provision who is also heir *alioqui successurus* must collate the heritage to which he succeeds, if he claims a share of the executry.<sup>1</sup> This includes heritage which he takes by disposition from his immediate ancestor.<sup>2</sup> If a father were to convey his heritage to his eldest son *inter vivos*, without valuable consideration, it would appear that the son, on the father's death, could not claim a share of the legitim fund without collating the heritage so conveyed.<sup>3</sup> The same principle is applicable to heirs of entail. An heir of entail, who is at the same time heir-at-law of the person to whom he serves, is bound, as a condition of sharing in the moveable estate, to collate the value of his life interest.<sup>4</sup>

**1128.** On the other hand, it is settled that an heir of entail who is one of the next-of-kin, and not heir *alioqui successurus*, is entitled to a share of the moveables without collation.<sup>5</sup> In like manner one of the next-of-kin, not being the heir-at-law, who takes the heritage by direct conveyance from the deceased, may take his share of moveables and is not bound to collate.<sup>6</sup>

## SECTION 6.—OF WHAT PROPERTY COLLATION MUST BE MADE.

**1129.** Where the obligation to collate attaches, the property which the heir must communicate comprehends everything to which he is entitled to succeed as heir. This includes feudal property, such as houses, and lands, and property heritable though not feudal, such as leases and bonds secluding executors.<sup>7</sup> It formerly included heirship moveables, now no longer claimable.<sup>8</sup>

## SECTION 7.—HEIR TAKING PERSONAL ESTATE BY TESTAMENT.

**1130.** The heir's privilege to collate is necessary only to enable him to assert his right as one of the next-of-kin. It does not apply to rights from which the next-of-kin are excluded. Accordingly, if the heir takes part of the moveable estate by testament, that does not impose upon him the obligation to collate the heritage.<sup>9</sup> Conversely, if the ancestor were to die intestate as to the heritage, but

<sup>1</sup> *Baillie v. Clark*, 23rd February 1809, F.C.; *Fisher's Trs. v. Fisher*, 1844, 7 D. 129.

<sup>2</sup> *Murray v. Murray*, 1678, Mor. 2374.

<sup>3</sup> Bankt. iii. 8, 28; *Anstruther v. Anstruther*, 1836, 14 S. 272, at p. 287; Bell, Law Dict.

<sup>4</sup> *Little Gilmour*, 13th December 1809, F.C.; *Anstruther v. Anstruther*, 1836, 14 S. 272; 2 S. & M'L. 369; *M. of Breadalbane v. M. of Chandos*, 1836, 2 Sh. & M'L. 377.

<sup>5</sup> *Duke of Buccleugh v. Earl of Tweeddale*, 1677, Mor. 2369; *Rae Crawford v. Stewart and Stirling*, 1794, Mor. 2384.

<sup>6</sup> *Anstruther v. Anstruther*, 1836, 14 S. 272 at p. 282.

<sup>7</sup> Fraser, H. & W. 1049. <sup>8</sup> 31 & 32 Vict. c. 101, s. 160.

<sup>9</sup> *Sinclair's Trs. v. Sinclair*, 1881, 8 R. 749, per Lord Justice Clerk Moncreiff at p. 756; M'Laren, Wills, i. 153, note (1).

were to leave a will bequeathing his moveables to the exclusion of the heir-at-law, the latter could not by collation acquire any right to share in the executry.<sup>1</sup> This must be taken subject to the qualification that the right to legitim cannot be excluded by *mortis causa* deed. If the heir were to claim legitim he would be bound to collate.<sup>2</sup>

#### SECTION 8.—COLLATION BY HEIRS-PORCIONERS.

**1131.** As regards the succession of heirs-portioners, the rules of collation are as follows: If the heirs-portioners constitute the whole next-of-kin, there is no room for collation, “for they are all heirs and all executors.”<sup>3</sup> In such a case one of the heirs-portioners, succeeding to the whole heritage by destination, is entitled to a share of the moveables without collation.<sup>4</sup> The rule is different where heirs-portioners are in the same degree of kindred with others who are not heirs-portioners. Thus, in the *Scotstarvet* case,<sup>5</sup> the ancestor was survived by daughters of his predeceasing brother, and by children of a predeceasing sister. The brother’s eldest daughter succeeded to the whole heritage under a destination. It was held by the Court of Session that she was not entitled to claim any part of the executry of her uncle without collating the heritable estate. In this case the eldest daughter was in competition, not with heirs-portioners only but with others who were not so. The judgment was reversed in the House of Lords on a ground which did not affect the principle of the decision.<sup>6</sup>

**1132.** A person who claims as an heir-portioner is not exempt from the obligation to collate on the ground that he or she succeeds to a part only of the heritable estate.<sup>7</sup> The rule by which, under s. 2 of the Intestate Moveable Succession Act, 1855,<sup>8</sup> an heir in heritage who is not one of the next-of-kin may, on collation, share in the moveable estate, extends to “daughters of the predeceaser, being heirs-portioners of the intestate.”

#### SECTION 9.—COLLATION ON INTESTACY UNDER ACCUMULATIONS ACT.

**1133.** When the accumulation of income directed by a settlement becomes unlawful by operation of the Accumulations Act, 1800,<sup>9</sup> the result may be that surplus income undisposed of falls into intestacy. It is settled that such income in so far as derived from heritage falls to be paid to the heir-at-law, and in so far as derived from moveable

<sup>1</sup> Bell, Com. (7th ed.), i. 96.

<sup>2</sup> Bell, Prin., s. 1910.

<sup>3</sup> *Anstruther v. Anstruther*, 1836, 14 S. 272, at p. 282.

<sup>4</sup> *Riccart v. Riccart*, 1720, Mor. 2378.

<sup>5</sup> *Balfour v. Scott*, 1787, Mor. 2379 ; 1793, 3 Pat. 300.

<sup>6</sup> *Anstruther v. Anstruther*, 1836, 2 Sh. & M’L. 369, per Lord Cottenham at p. 374 ; M’Laren, Wills, i. 155.

<sup>7</sup> *Logan’s Exrs. v. M’Lennan and Ors.*, 1908, 45 S.L.R. 309.

<sup>8</sup> *Supra*, para. 1123.

<sup>9</sup> 39 & 40 Geo. III. c. 98.



estate to the heirs *in mobilibus*. The succession must be dealt with having regard to the character of the estate as it existed at the date of the settlor's death, subject to the exception that rents of heritable property lawfully accumulated become moveable in the hands of the trustees, and the income derived from such accumulations goes to the heirs *in mobilibus*. The heir-at-law is not entitled to share in the revenue derived from the moveable estate, except on condition of collating the heritage received by him.<sup>1</sup>

**1134.** In *Campbell's Trs. v. Campbell*<sup>2</sup> (a decision which has been much criticised), it was held that after the date when the Accumulations Act came into operation, the rents of heritage accruing at each term fell to the person holding at the time the character of heir-at-law. In pursuance of this rule it was decided in the Outer House in one case,<sup>3</sup> that as each term's rents accrued the person then holding the character of heir-at-law was entitled to elect whether or not he would collate that term's rents so as to share in the income of the moveable portion of the estate. The basis of such a decision as this would be cut away if the rule were to be followed—for which there is ample authority—that, whether in heritable or moveable succession, no person can claim to succeed as heir *ab intestato* who did not possess that character at the date of death of the intestate. "A man's heir-at-law in heritage is the person whom the law designates as such at the time of his death, and he can never have any other."<sup>4</sup>

#### SECTION 10.—DESIGNATIVE BEQUESTS IN FAVOUR OF "HEIRS."

**1135.** Questions in relation to collation sometimes arise in testate succession where a designative bequest is made in favour of persons described as the heirs or successors, not of the testator himself, but of someone else. The word "heir" is a flexible term, and the construction of such a bequest depends upon the nature of the subject. If the estate be wholly heritable it goes to the heir in heritage of the *propositus*: if it be wholly moveable it goes to the heirs *in mobilibus*. Where the subject of bequest is a mixed estate of heritage and moveables, a question of difficulty may arise. The heir-at-law may be of the same degree in blood as the other next-of-kin. In such a case, does the ordinary rule of succession apply that the heir in heritage is not entitled to assert his right as one of the next-of-kin, except on condition of throwing the heritage into the common stock? This question has been discussed in three important cases which call for special notice.

<sup>1</sup> *Logan's Trs. v. Logan*, 1896, 23 R. 848; *Moon's Trs. v. Moon*, 1899, 2 F. 201; *Watson's Trs. v. Brown*, 1923 S.C. 228.

<sup>2</sup> 1891, 18 R. 992.

<sup>3</sup> *Hunter's Trs. v. Edinburgh Chamber of Commerce*, 1911, 2 S.L.T. 287.

<sup>4</sup> *Lord v. Colvin*, 1860, 23 D. 111; 1865, 3 M. 1083; *Haldane's Trs. v. Murphy*, 1881, 9 R. 269, per Lord Pres. Inglis at p. 280; *Wylie's Trs. v. Bruce*, 1919 S.C. 211, per Lord Dundas at p. 226.

**1136.** In *Blair v. Blair*<sup>1</sup> the testatrix directed her trustees to account for the whole residue of her heritable and personal estate to William Blair "or his heirs or successors." Mr Blair predeceased the testatrix leaving issue, and a competition arose between his eldest son and the younger children. It was held that the trust estate, in so far as it consisted of heritage, fell to the eldest son as heir-at-law. It was further held that the estate so far as personal went to the heirs *in mobilibus*. It was conceded on behalf of the younger children that the heir-at-law was entitled to share in the moveables, but it was contended that he could do so only on condition of collating the heritage. This contention was sustained by a majority of the Court. In respect that this was a case of testate succession, and that the eldest son took the property, not as heir to his father but as disponee of a stranger, the decision is described by Lord Fraser as "somewhat difficult to understand."<sup>2</sup> It was explained in a later case<sup>3</sup> as having proceeded upon the theory that what the testatrix directed was that the heirs of William Blair were to take the trust estate, heritable and moveable, as if it had been William Blair's own estate, and his whole estate, and he had died intestate.

**1137.** In the case of *Sinclair's Trs. v. Sinclair*<sup>4</sup> the heir of entail in possession of an estate by his settlement bequeathed one-third of the residue of his estate and effects, heritable and moveable, to his son, Colonel Alexander Sinclair, "and to his heirs, executors, and successors." This son predeceased the testator, leaving three children, the eldest of whom succeeded to the entailed estate on the death of his grandfather. The residue, of which the proportion of one-third formed the legacy in question, consisted entirely of moveable succession. Colonel Sinclair himself had left no heritage, and his successors in moveables were his children, or next-of-kin, including his eldest son. In a question between the eldest son and the other children it was held that the former was entitled to take a share of the grandfather's bequest without collating his life interest in the entailed estate. The majority of the Court were of opinion that in the circumstances there was no room for the doctrine of collation, and that the heir of entail was entitled to a share of the residue in consequence of the expressed will of the testator. There were expressions in the settlement which were founded on as pointing to that result, but the Lord Justice-Clerk (Moncreiff) expressed his disagreement with the conclusion arrived at in *Blair v. Blair*. The ground of his judgment was that collation only arises as a condition of the right to claim heritable and moveable succession of the same ancestor.

**1138.** The case of *Blair* was, however, followed in *Grant's Trs. v. Slimon*.<sup>5</sup> There a testatrix by her trust disposition and settlement directed that the residue of her whole means and estate, heritable and moveable, should be paid "to my brother the said William James Slimon

<sup>1</sup> 1849, 12 D. 97.

<sup>3</sup> *Grant's Trs. v. Slimon*, 1925 S.C. 261.

<sup>2</sup> Fraser, H. & W. 1047, note (c).

<sup>4</sup> 1881, 8 R. 749.

<sup>5</sup> 1925 S.C. 261.

absolutely and to his heirs." The brother predeceased the testatrix, leaving a son and daughter who survived her. The residue included both heritable and moveable estate. It was conceded by the parties that the division fell to be made distributively according to the character of the estate. The son claimed the right to take the whole of the heritage as his father's heir-at-law, and also to take half the moveables as one of his next-of-kin. This contention was negatived by the Court, who held that the heir had exclusive right to the heritage, but that it was open to him, by collating the heritage, to share equally with his sister in the aggregated estate. It was observed<sup>1</sup> that where a testator invokes the rules of intestate succession for the purpose of determining the manner in which his estate should be distributed, there is no reason for assuming that he intended to exclude the principle of *collatio inter hæredes*, which forms an integral part of the law of intestate succession. This was a case where the testator had made a bequest in favour of heirs entitled to succeed *ab intestato* upon the fictitious intestacy of a third party.<sup>2</sup>

1139. The important point to note with reference to all the cases quoted in this section is that the construction of a bequest by a testator is always purely a *quæstio voluntatis*. That was recognised by the judges in *Grant's Trs. v. Slimon*. The result arrived at in that case as to the method of distributing the estate would have been precisely the same if it had been held that the intention of the testatrix was that her entire estate should be massed and that all the children of her brother should share equally in the massed estate. Subject to the observation that all rules of construction must yield to evidence of intention, it may be said that the following points are fixed: (1) A testamentary bequest to "heirs" has stamped upon it a distributive effect as between heritage and moveables; (2) such a bequest amounts to a direction that the legal order of succession is to be followed; (3) it is presumed that the testator intended that the doctrine of *collatio inter hæredes*, which is part of the legal order of succession, should be observed.

#### SECTION 11.—THE HEIR MUST COMMUNICATE THE WHOLE HERITAGE.

1140. If the heir claims any part of the personal estate, he must communicate to the persons against whom he claims it the entire heritage to which he has succeeded. If he claims legitim he must throw the entire heritage into the legitim fund.<sup>3</sup>

#### SECTION 12.—RIGHT TO COLLATE MAY BE TRANSMITTED.

1141. If an heir who is also one of the next-of-kin dies without collating, the question may arise whether his representatives are entitled

<sup>1</sup> Per Lord Skerrington at p. 269.    <sup>2</sup> See also *Smith's Trs. v. Macpherson*, 1926 S.C. 983.

<sup>3</sup> *Gilmour v. Gilmour's Trs.*, 1920, 2 S.L.T. 369.



to do so. In a case which occurred prior to 1874 a lady who left both heritable and moveable estate died intestate, survived by a brother and two sisters. The brother, who was the heir-at-law, possessed on apparenecy for many years and died without having ever made up a title to the heritage. On his death his son completed a title by serving direct as heir to the intestate. In these circumstances it was held that the brother's testamentary trustees had no claim to share in the intestate's moveable estate. As they were not in a position to communicate the heritage, they could not exercise the privilege of collation.<sup>1</sup> By the Conveyancing (Scotland) Act, 1874,<sup>2</sup> possession on apparenecy was abolished. By mere survivance an heir acquires a personal right to heritage without service or other procedure. If an heir-at-law having thus a right to the heritage were to renounce his privilege of collation, his representatives could not assert a claim to a share of the executry in face of such repudiation.<sup>3</sup> Whether the heir has or has not waived his right to collate is purely a question of fact. The right of the heir to assert his claim to share in the moveable estate—the *jus conferendi* as it is called—is not an intransmissible right. The circumstances may shew that the heir never made any election, and the representatives may be entitled to make it after his death.<sup>4</sup>

#### SECTION 13.—MODE OF GIVING EFFECT TO COLLATION.

1142. Collation is described by the institutional writers as a communication of the heritable estate itself with the other next-of-kin, who in their turn must collate or communicate the executry with him.<sup>5</sup> It is not doubtful that the heir sufficiently discharges his obligation by making up title to the heritable estate, and executing a conveyance in favour of himself and the other personal representatives *pro indiviso* in proportion to their respective interests. He is not bound to settle on the basis of a money payment. Thus in an early case<sup>6</sup> the report bears that: "The Lords admitted the heir to a share with the other bairns, providing that he communicate all that he had of the heritable estate, by disposition or succession, by being infeft as heir, and disposing to the children an equal share with himself of the said heritable estate, with the burden of an equal share of the heritable debt."

1143. On the other hand, the heir may desire to keep the property for himself and to settle with the executors by a money compensation. It is not finally settled that he has a legal right to do so. It has, indeed, been laid down by eminent text-writers<sup>7</sup> that the heir is not bound to surrender the heritage for division, and that it is sufficient that the value of it be taken into account. This was the result arrived at in

<sup>1</sup> *Newbigging's Trs. v. Steel's Trs.*, 1873, 11 M. 411.

<sup>2</sup> 37 & 38 Vict. c. 94, s. 9.

<sup>3</sup> Bell, Prin., s. 1911.

<sup>4</sup> *Waddell's Judicial Factor v. Waddell*, 1924 S.C. 877.

<sup>5</sup> Stair, iii. 8, 48; Ersk. iii. 9, 3; Bell, Prin., s. 1910.

<sup>6</sup> *Murray v. Murray*, 1678, Mor. 2374.

<sup>7</sup> *E.g.* M'Laren, Wills, i. 157.



*Fisher's Trs. v. Fisher*,<sup>1</sup> but the decision to some extent depended on specialties, and it has been doubted whether the case by itself is sufficient to establish any general rule.<sup>2</sup> Moreover, there is some authority to the contrary effect.<sup>3</sup> Accordingly, in the latest case on the subject,<sup>4</sup> the question was reserved whether the heir has the option to retain the property and account for its value, and the point must be regarded as still an open one.

#### SECTION 14.—INTERNATIONAL ASPECTS OF COLLATION.

**1144.** The succession to moveable estate is regulated by the law of the domicile. Collation is a doctrine peculiar to the law of Scotland, and is part of the law of personal succession. An heir who claims to participate in the moveable succession of a domiciled Scotsman must collate the heritage which he has succeeded to from the deceased, even although the heritage is situated in a foreign country.<sup>5</sup> On the other hand, as collation is unknown to the law of England, an heir who takes a share of a personal succession under English law is not bound to communicate heritable estate situate in Scotland which he inherited from the same ancestor.<sup>6</sup>

### PART II.—COLLATIO INTER LIBEROS.

#### SECTION 1.—GENERAL PRINCIPLE.

**1145.** It often happens that occasions arise which lead a father to make advances to one or more of his children, *e.g.* for the purpose of setting a son up in a profession or trade, or providing a marriage portion for a daughter. The law, however, which gives to children a right to an equal share of the legitim, views with disfavour any alienation by which such equality is disturbed, and requires any child who has received such an advance to attribute it to his share of legitim, under certain limitations. The object of *collatio inter liberos* is to preserve equality in the distribution of legitim among those entitled to receive it. Its effect is not to increase the total legitim debt, but to make the several shares of it unequal, so as to equalise the entire benefits received by the children respectively from the parent.<sup>7</sup>

#### SECTION 2.—DOES NOT AFFECT RIGHTS OF THIRD PARTIES.

**1146.** This kind of collation operates only among those children who have not discharged their right to legitim, and it operates only *inter se*, and not in questions with third parties. Accordingly, neither

<sup>1</sup> 1850, 13 D. 245.

<sup>2</sup> *Napier v. Orr*, 1868, 6 M. 264, at p. 273.

<sup>3</sup> *Waddell's Judicial Factor v. Waddell*, 1924 S.C. 877.

<sup>4</sup> *Robertson v. Macvean*, 18th February 1817, F.C.

<sup>5</sup> *Balfour v. Scott*, 1793, 3 Pat. 300; *M'Laren, Wills*, i. 151.

<sup>7</sup> *Ersk.* iii. 9, 24.

<sup>2</sup> *Fraser, H. & W.* 1055.

is a child bound to collate advances so as to increase the relict's share, nor is the relict required to collate donations which she may have received from her husband during his life so as to increase the legitim of the children.<sup>1</sup> Nor are children called on to collate with the parent's executors or residuary legatees.<sup>2</sup>

### SECTION 3.—THE PARENT'S INTENTION IS MATERIAL.

**1147.** *Prima facie* all advances of a substantial nature made by a father to a child out of the father's moveable estate fall to be collated.<sup>3</sup> The intention of the father is, however, important and must always be considered.<sup>4</sup> Collation is excluded where it sufficiently appears to have been the granter's intention that the child should have the provision as a *præcipuum* over and above his share of legitim.<sup>5</sup> Thus, the father may expressly state that the provision is in addition to legitim, or he may declare that notwithstanding the advance the child shall have an equal proportion of his goods at his death with the other children.<sup>6</sup> According to an early decision,<sup>7</sup> an exemption from collation is implied by the declaration that the child shall continue to be "a bairn in the house."

**1148.** The intention of the father on this subject is sometimes a matter of difficulty.<sup>8</sup> It may not be essential that there should be any express declaration of the father's intention to make the provision a *præcipuum*. There appears to be no reason why the intention should not be inferred from facts and circumstances.<sup>9</sup> Generally, it may be said that when the parent says nothing to the contrary, the law will presume that advances otherwise collatable are intended to be imputed towards legitim.<sup>10</sup>

### SECTION 4.—WHAT ADVANCES ARE COLLATABLE?

**1149.** In the absence of any expression of intention on the part of the parent, the question whether an advance does or does not fall to be collated depends upon the nature of the advance and the reasons for making it. The general rule is that all advances made by a father out of his moveable estate, for the purpose of setting up a child in a

<sup>1</sup> *Ross v. Kellie*, 1627, Mor. 2366; *Balmain v. Glenfarguhar*, 1719, Mor. 2378; *Stair*, iii. 8, 46; *Ersk.* iii. 9, 25; *McLaren, Wills*, i. 164; *Keith's Trs. v. Keith*, 1857, 19 D. 1040; *Trevelyan v. Trevelyan*, 1873, 11 M. 516.

<sup>2</sup> *Clark v. Burns*, 1835, 13 S. 326; *Keith's Trs. v. Keith*, *supra*; see also para. 1158.

<sup>3</sup> *Ersk.* iii. 9, 24; *Duncan v. Crichton's Trs.*, 1917 S.C. 728.

<sup>4</sup> *Collins v. Collins' Trs.*, 1898, 35 S.L.R. 641.

<sup>5</sup> *Ersk.* iii. 9, 25; *Bell, Prin.*, s. 1589; *McLaren, Wills*, i. 168, 169.

<sup>6</sup> *Corsan v. Corsan*, 1631, Mor. 2367, 12849.

<sup>7</sup> *Bayly v. Leproik*, 1737, Mor. 2379, 12851; *Elchies, Forisfam.* 1; but see *Ersk.* iii. 9, 25, and *Duncan v. Crichton's Trs.*, *supra*, at p. 733.

<sup>8</sup> *Skinner v. Skinner*, 1775, Mor. 8172; *Douglas v. Douglas*, 1876, 4 R. 105.

<sup>9</sup> *Fraser, H. & W.* 1039.

<sup>10</sup> *Collins v. Collins' Trs.*, *supra*, per Lord Stormonth-Darling at p. 642.

profession or trade, or as a marriage portion, must be collated.<sup>1</sup> To this rule, however, several exceptions must be noted.

### SECTION 5.—EXCEPTIONS.

#### SUBSECTION (1).—*Advances not out of Moveable Estate.*

**1150.** There is no collation *inter liberos* if the advances be not made out of moveable estate. Thus, where a land estate or a heritable right is provided to a younger child, he is not bound to collate it. The subject of the legitim is not impaired by such provision.<sup>2</sup>

#### SUBSECTION (2).—*Loans or Ordinary Debts.*

**1151.** The advance must be of such a nature that neither the father nor his executors can claim repayment. Loans or ordinary debts cannot be made the subject of collation: they must be paid into the general executry.<sup>3</sup>

#### SUBSECTION (3).—*Mortis causa Provisions.*

**1152.** Testamentary provisions, being chargeable against executry or dead's part, are not required to be collated, as they do not diminish the fund from which legitim is taken.<sup>4</sup>

#### SUBSECTION (4).—*Casual Gifts.*

**1153.** Casual gifts of inconsiderable amount, such as birthday presents or gifts intended for immediate consumption, would not, as a general rule, fall to be taken into account.<sup>5</sup> If the amount were substantial, the presumption would be to the opposite effect. The use by the parent of such words as "free gift" would not be conclusive. Such an expression might be intended merely to exclude the idea of loan, without taking the payment out of the category of an advance on account of legitim.<sup>6</sup>

#### SUBSECTION (5).—*Onerous or Remuneratory Payments.*

**1154.** The other important exceptions are: (a) Advances intended as a recompense for services rendered;<sup>7</sup> (b) advances for maintenance or education in minority or prior to emancipation, and which are due

<sup>1</sup> Stair, iii. 8, 45; Ersk. iii. 9, 24; Bell, Prin., s. 1588; Bankt. iii. 8, 17; Douglas v. Douglas, 1876, 4 R. 105.

<sup>2</sup> Stair, iii. 8, 46; Ersk. iii. 9, 25; Duke of Buccleugh v. Earl of Tweeddale, 1677, Mor. 2369; Bell, Prin., s. 1588; Marshall v. Marshall's Trs., 1829, 8 S. 110; Minto v. Kirkpatrick, 1833, 11 S. 632; Nicolson's Assignee v. Hunter, 3rd March 1841, F.C.

<sup>3</sup> Webster v. Rettie, 1859, 21 D. 915.

<sup>4</sup> Ersk. iii. 9, 25.

<sup>5</sup> Webster v. Rettie, *supra*, per Lord Ivory at p. 926; Duncan v. Crichton's Trs., *supra*, at p. 733.

<sup>6</sup> Douglas v. Douglas, *supra*; Gilmour's Trs. v. Gilmour, 1922 S.C. 753.

<sup>7</sup> Minto v. Kirkpatrick, 1833, 11 S. 632.

*ex debito naturali*.<sup>1</sup> The whole matter is summed up by Lord M'Laren<sup>2</sup> thus: "Collation applies to provisions as distinguished from payments under obediential obligations, or which are made on the footing of contract."

SECTION 6.—*COLLATIO INTER LIBEROS* OPERATES ONLY AMONG CHILDREN CLAIMING LEGITIM.

**1155.** It is only among children entitled to claim, and in fact claiming, legitim that the principle of *collatio inter liberos* falls to be applied. In this connection it is important to keep in view the distinction between the exclusion of legitim during the lifetime of the parent and the discharge or satisfaction of it after the parent's death. In the former case, the legal effect is the same as if the child had predeceased the parent. The children whose legitim has not been excluded divide the whole legitim fund among them. Neither *jus relictæ* nor dead's part gains anything: the exclusion enures solely to the benefit of the non-renouncing children.<sup>3</sup> But if no exclusion has taken place during the parent's lifetime, each surviving child acquires at the date of death of the parent a vested right in an aliquot part of the legitim fund. If in such circumstances a child discharges its claim to legitim, say by accepting a testamentary provision offered in its place, the result is not to enlarge the shares of the other children. Each of the other children remains creditor merely for his own original share. In this case the discharge or renunciation of legitim enures to the benefit of the testamentary disponent.<sup>4</sup>

**1156.** The difference in result may be illustrated by a simple example. A father dies survived by five children. Four of those children have renounced their right to legitim during their father's lifetime, but the fifth child has granted no renunciation. The child whose legitim has not been excluded takes the whole legitim fund. Assume next that no renunciation by any child has taken place during the father's lifetime, but that after his death four of the children discharge their legitim in exchange for conventional provisions. The remaining child repudiates the settlement and claims legitim. His right is limited to one-fifth of the legitim fund.

**1157.** In the case above supposed, where the non-renouncing child is entitled to claim one-fifth of the fund, it may be further assumed that each of the five children has received advances during the father's lifetime. If the whole of the advances made to each child were to be collated, the result might be that the child claiming legitim would receive a larger sum than if none of the advances were brought into account. The claiming child would therefore have an interest to maintain that all the advances should be collated, for the purpose of ascertaining the true proportion of the fund payable to himself. It is settled, however,

<sup>1</sup> *Irving v. Irving*, 1694, 4 Bro. Supp. 144.

<sup>2</sup> M'Laren, Wills, i. 169.

<sup>3</sup> *Hog v. Hog*, 1791, Mor. 8193; 1792, 3 Pat. 247; *Baron Panmure v. Crockat*, 1856, 18 D. 703.

<sup>4</sup> *Fisher v. Dixon*, 1840, 2 D. 1121; 1843, 2 Bell, App. 63.



that this contention is unsound. If a child is content with the provision made for him under his father's settlement, other children cannot insist that advances made to him be brought into computation. *Collatio inter liberos* is an equitable rule designed to secure equality in the distribution of the fund among children who are claimants upon it. It has application only when more than one child claims legitim. If there is only one claimant, the doctrine cannot be invoked either in his favour or to his prejudice.<sup>1</sup>

**1158.** The contention that *collatio inter liberos* might be pleaded by or against the father's general dispoinee was based upon the theory that a child who accepts a conventional provision in lieu of legitim thereby assigns his claim of legitim—with its inherent privileges and liabilities—to the executor or residuary legatee. This contention has given rise to much controversy. The accepted view now is, that when a child accepts a conventional provision he discharges his claim to legitim but he does not assign it. "He merely withdraws the restraint which as a child he possessed over the testamentary power of his father."<sup>2</sup> The plea of collation, therefore, cannot be taken against the residuary legatee. Nor can the latter maintain it in his favour, to the effect of increasing the dead's part.

#### SECTION 7.—"IMPUTATION TO LEGITIM."

**1159.** It is common, but not invariable, for a father to take acknowledgments from his children for advances made to them *inter vivos*. Advances are sometimes described as payments to account of legitim: sometimes the words used are that the sum is to be "imputed" to legitim. The latter expression is recognised as meaning that the rule of *collatio inter liberos* is to be applied. The liability of the executors to account for the legitim fund is not affected. It is possible for the father, however, to make a transaction with his child whereby he purchases from the latter a partial discharge of legitim. This may be done by a payment made during the father's lifetime in discharge *pro tanto* of the share of legitim to which the child is prospectively entitled. The right to legitim is not renounced, and the payment does not carry any obligation to collate. But the discharge operates by way of set-off in favour of the executry estate against the child's share of legitim.<sup>3</sup> Thus in the case of *Young v. Young's Trs.*<sup>4</sup> a father made several *inter vivos* payments to a son, and took an acknowledgment which bore that the sums were "payments to me on account of the share of legitim or bairn's

<sup>1</sup> *Clark v. Burns*, 1835, 13 S. 326; *M. of Breadalbane v. M. of Chandos*, 1836, 2 Sh. & M'L. 377, at p. 401; *Keith's Trs. v. Keith*, 1857, 19 D. 1040; *Monteith v. Monteith's Trs.*, 1882, 9 R. 982; *Collins v. Collins' Trs.*, 1898, 35 S.L.R. 641; *Coats' Trs. v. Coats*, 1914 S.C. 744; *Gilmour's Trs. v. Gilmour*, 1922 S.C. 753. The case of *Nisbet's Trs. v. Nisbet*, 1868, 6 M. 567, has been definitely disapproved.

<sup>2</sup> Per Lord Rutherford Clark in *Monteith v. Monteith's Trs.*, *supra*, 1882, 9 R. at p. 1008.

<sup>3</sup> *Gilmour's Trs. v. Gilmour*, *supra*, 1922 S.C. at p. 770.

<sup>4</sup> 1910 S.C. 275.

part of gear that may become due to me . . . which share of legitim or bairn's part of gear is now discharged by me to that extent." The son contended that the effect of this receipt was merely to require him to bring the advances into account in a question with other children claiming legitim. It was held by a majority of the Court that the father had bargained on account of his general estate, and that the trustees were entitled to set off the advances against the son's claim for payment of legitim.

1160. This decision does not displace the rule that when advances are spoken of as "imputed" to legitim, that means, or is consistent with meaning, that they are to be collated. If it be maintained that the intention of the parent in taking a receipt was, not to secure equality among the children but to benefit the general estate, that must be shewn by clear and unambiguous language.<sup>1</sup>

#### SECTION 8.—INTEREST ON ADVANCES.

1161. Where advances are collated, it is now settled that in the absence of evidence that the father intended otherwise, interest does not fall to be added to the sums advanced so as to increase the amount collated.<sup>2</sup>

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<sup>1</sup> *Gilmour's Trs. v. Gilmour*, 1922 S.C. 753, at p. 779.

<sup>2</sup> *Gilmour's Trs. v. Gilmour*, *supra*, disapproving of *Johnston v. Cochran*, 1829, 7 S. 226.

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## COLLECTING SOCIETY.

*See* FRIENDLY SOCIETIES.

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## COLLEGE OF JUSTICE.

*See* COURT OF SESSION.

# COLLISION AT SEA.

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## SECTION 1.—INTRODUCTORY.

**1162.** The object of the following sections is to state briefly, and in a general way, the specialties of the law of reparation for negligence in the case of collision between ships. To a considerable extent ordinary rules apply, and these call for no special notice. The measure of damages is ascertained by reference to the same principles as in other cases of damage to property by negligence. Claims for loss of life in respect of collision may be made by the same persons, and no others, who can claim in the ordinary case. Claims arising out of a collision on the high seas between two ships of different nationalities can only be enforced to the extent allowed (1) by the law of the domicile of the ship on which the injured person was, and (2) by the law of the wrong-doing ship.<sup>1</sup>

**1163.** What constitutes negligence or contributory negligence may be ascertained by reference to common-law principles. The application of the rule that though a pursuer may have been guilty of negligence which may in fact have contributed to the accident, yet if the defender could, in the result, by the exercise of ordinary care, have avoided the mischief which happened, the defender will be liable, requires special consideration in the case of collision.<sup>2</sup> As the navigation of a ship at sea requires a high degree of care, skill, and presence of mind, there is negligence

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GENERAL AUTHORITIES.—Marsden on Collisions at Sea, 8th ed. ; Roscoe on Damages in Maritime Collisions.

<sup>1</sup> *Kendrick v. Burnett*, 1897, 25 R. 82.

<sup>2</sup> See *H.M.S. "Sans Pareil"*, [1900] P. 267 (C.A.) and cases there cited, and *The "Volute"*, [1922] 1 A.C. 129.

if the collision is due to want of the care and skill of a competent seaman, applied with due presence of mind to the emergencies which arise at sea. On the other hand, in general, there is no responsibility if the casualty is due either to want only of extraordinary care and skill, or to such mistakes and errors of judgment as a man exercising care and skill, and having ordinary presence of mind, may commit in what has been called the agony of the collision.<sup>1</sup> The specialties in the law are due to the fact that ships are navigated on the high seas, and are subject to the law maritime, to the Regulations for Preventing Collision at Sea (which in this country rest on statute,<sup>2</sup> but are also international regulations), to the Maritime Conventions Act, 1911,<sup>3</sup> and to statute law generally.

#### SECTION 2.—INEVITABLE ACCIDENT.

1164. There is no liability if the collision is due to no fault on the part of either ship in the sense already explained.<sup>4</sup>

#### SECTION 3.—INSCRUTABLE FAULT.

1165. The same result follows, though there must have been fault somewhere, if there is no sufficient evidence to shew which ship is at fault.<sup>5</sup>

#### SECTION 4.—TWO OR MORE SHIPS IN FAULT.

1166. By the Maritime Conventions Act, 1911,<sup>6</sup> s. 1, it is provided that where by the fault of two or more vessels damage or loss is caused to one or more of them, the liability shall be in proportion to the degree in which each vessel is at fault, subject to provisos to the effect that, if it is not possible to apportion the degree of fault the liability shall be apportioned equally, that no vessel shall be liable for any damage to which her fault has not contributed, and that the section shall not affect any defence under a contract of carriage. The effect of the last proviso is that it safeguards a carrier's rights as regards defences based on the exemptions in a bill of lading or charter-party as regards cargo. Further, assuming a collision between a tug and tow and a third vessel, either tug or tow can found on its contract with the other as defining their mutual liabilities.<sup>7</sup>

1167. The rule before the passing of the Maritime Conventions Act was that, if both vessels were in fault, the whole damage was equally

<sup>1</sup> *Hine Bros. v. Clyde Trs.*, 1888, 15 R. 498; *S.S. "Rowan" v. S.S. "West Camak"*, 1924 S.C. (H.L.) 37.

<sup>2</sup> Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

<sup>3</sup> 1 & 2 Geo. V. c. 57.

<sup>4</sup> See *The "Toward"*, 1885, 13 R. 342; *The "William Lindsay"*, 1873, L.R. 5 P.C. 338; *The "Merchant Prince"*, [1892] P. 179; *The "Nador"*, [1909] P. 300.

<sup>5</sup> Marsden on Collision, p. 3; *The "Olympic" v. H.M.S. "Hawk"*, [1913] P. 264, per Vaughan Williams, L.J., at p. 247; but see Bell's Com. (M.L. ed.), vol. i. p. 626.

<sup>6</sup> 1 & 2 Geo. V. c. 57.

<sup>7</sup> *The "Cairnbahn"*, [1914] P. 25.



divided. By that Act this rule was altered and the liability for the loss is now apportioned between the vessels in accordance with their relative degrees of fault, *e.g.* two-thirds and one-third.<sup>1</sup> Assuming steamships A. and B. to be in fault two-thirds and one-third respectively, and A.'s loss to be £9000, and B.'s £3000; A. then falls to recover one-third of his loss from B., *i.e.* £3000, and B. two-thirds of his loss from A., *i.e.* £2000. B. would pay A. £1000. To put it another way: A. is responsible for two-thirds of the whole loss—£12,000,—*i.e.* £8000, and B. for the balance—£4000. A.'s loss is £9000. B. therefore pays him £1000.

**1168.** The application of the rule laid down in the Act is, it is thought, not limited to cases of actual contact between vessels causing damage. Article 13 of the Convention mentions damage whether due to "the execution or non-execution of a manœuvre, or the non-observance of Regulations even if the collision had actually taken place." This view was approved by Lord Parker and L. J. Warrington in *The "Cairnbahn,"*<sup>2</sup> and in *The "Batavier III."*<sup>3</sup> it was held by Mr Justice Hill that the statute was not confined to cases of collision.<sup>4</sup> It is thought, however, that the Act will only apply where the matter arises out of the faulty navigation of two or more vessels, and that where a vessel collides with a pier, and the question is whether this was due to the fault of the ship or, say, the negligent orders of the harbour-master, the ordinary rules of contributory negligence will apply as they did prior to the passing of the Act.<sup>5</sup>

**1169.** The rule applies to cargo claims. Cargo owners can only recover from each vessel the proportion of the loss, for which that vessel is in fault, and as regards the vessel on which their cargo is, can only recover subject to any defence based on the contract of carriage.

**1170.** By s. 2 of the Act, the liability of owners for loss of life or personal injuries is declared to be joint and several. The proviso, however, safeguards a carrier's right to found on any contract he has with the passenger.

Sec. 3 provides that if, under s. 2, one owner pays more than his proportion, he may recover the excess from the other, unless the person recovering could not have recovered from that owner in a direct action owing to any statutory or contractual limitation of liability.

Assuming a collision for which vessels A. and B. are in fault one-third and two-thirds respectively, and C., a passenger on A., to have been injured. C. sues B. and is awarded £3000 damages. B. can recover £1000 from A., unless a claim by C. against A. is barred by the conditions of his ticket or otherwise. The life claims, etc., arising out of the loss of the *Rowan* as the result of her being run down by the *Clan Malcolm* illustrate how such matters are worked out.<sup>6</sup>

<sup>1</sup> *Crown Steamship Co. v. Eastern Navigation Co.*, 1918 S.C. 303.

<sup>2</sup> [1914] P. 25.

<sup>3</sup> 1925, 42 T.L.R. 8.

<sup>4</sup> *Cf.* also Marsden, p. 142.

<sup>5</sup> *Cf. Renney v. Magistrates of Kirkcudbright*, 1892, 19 R. (H.L.) 11.

<sup>6</sup> See *Lewis v. Laird Line, Ltd. & Ors.*, 1925, S.L.T. 316.

No contribution is payable in respect of sums paid in respect of Workmen's Compensation.<sup>1</sup>

#### SECTION 5.—ONE SHIP ALONE IN FAULT.

**1171.** Where one ship alone is in fault, that ship is liable. Although it is common to speak of the liability as that of the ship, it is primarily that of those who are either themselves at fault or are responsible for those who have been. In the case, *e.g.*, of a ship demised to charterers who employ and pay the crew, the shipowner is not responsible personally for the fault of the crew in bringing about a collision.<sup>2</sup>

#### SECTION 6.—COMPULSORY PILOTAGE.

**1172.** A shipowner used not to be liable for loss by collision due to the fault of a pilot employed by him compulsorily, *i.e.* in obedience to statutory or other law.<sup>3</sup> The pilot is not his servant. This exemption was abolished by the Pilotage Act, 1913,<sup>4</sup> although compulsory pilotage remains in certain waters, *e.g.* the Clyde. It is not now necessary to discuss the questions which used to arise as to whether the fault causing a collision was that of the pilot or of the crew, or to refer to the numerous cases dealing therewith.

#### SECTION 7.—MARITIME LIEN FOR COLLISION.

**1173.** There is a maritime lien of the nature of an hypothec over a ship in collision for the loss due to fault on the part of those in charge. The lien may be discharged by laches in making it good, but it takes precedence of, *e.g.*, a purchaser without notice, a mortgagee, or a prior bottomry bondholder.<sup>5</sup> The Admiralty law of the United Kingdom is the same in the three countries.<sup>6</sup>

**1174.** There is no lien where the ship is a wreck and the accident is due to insufficient lighting on the part of port authorities;<sup>7</sup> but there would appear to be a lien where the ship is in possession of a charterer to whom the ship is demised.<sup>8</sup> In such cases the ship must be proceeded against by an action *in rem*, the vessel being arrested after special application to the Court.<sup>9</sup> There is no lien if the ship has been wrongfully taken out of the owner's possession. See MARITIME LIEN.

<sup>1</sup> *The "Molière,"* 1924, 41 T.L.R. 154.

<sup>2</sup> *The "Baumwoll Manufactur" v. Furness*, [1893] A.C. 8; *Sir John Jackson, Ltd. v. Owners of S.S. "Blanche,"* [1908] A.C. 126.

<sup>3</sup> Merchant Shipping Act, 1894, s. 633.

<sup>4</sup> 2 & 3 Geo. V. c. 31.

<sup>5</sup> Marsden, p. 84 *et seq.*; *M'Knight v. Currie*, 1895, 22 R. 607; 1896, 24 R. (H.L.) 1.

<sup>6</sup> *M'Knight, supra*; cf. *Sailing Ship Blairmore Co. v. Macredie*, [1898] A.C. 593, per L. Watson at p. 605.

<sup>7</sup> *The "Utopia,"* [1893] A.C. 492; see also *Galloway*, 1881, 18 S.L.R. 518.

<sup>8</sup> *The "Tasmania,"* 1888, 13 P.D. 110.

<sup>9</sup> *The Clan Line Steamers v. Earl of Douglas S.S. Co.*, 1913 S.C. 967; *M'Connachie, Petr.*, 1914 S.C. 853.

## SECTION 8.—LIMITATION OF LIABILITY.

**1175.** By statute, liability in the case of collision is limited, where there is not personal fault on the part of the owner, to the amount of £8 per ton where there is loss only of ship or goods, and £15 per ton if this amount is needed to satisfy claims for loss of life or personal injury.<sup>1</sup> By the Merchant Shipping Act, 1900,<sup>2</sup> the limitation of liability is extended to all cases where without the actual fault or privity of the owners any damage is caused to property or rights of any kind by reason of the improper navigation or management of the ship. Reference may be made to three Scots cases on the subject.<sup>3</sup> It may be mentioned that by the same Act the owners of docks or canals, harbour authorities, and conservancy authorities have conferred on them a like limitation of liability to that which shipowners possess. Such limitation has been held in England not to be restricted to a dockowner's acts solely as such, but to extend to acts done by the dockowners as ship repairers in their dock.<sup>4</sup>

**1176.** By the Merchant Shipping Act, 1898,<sup>5</sup> s. 1, as amended by the Merchant Shipping Act, 1906,<sup>6</sup> ss. 70 and 85, shipbuilders, etc., get the benefit of limitation from the time of and including the launch of any ship. A charterer to whom a ship is demised is, within the meaning of the Merchant Shipping Act, an owner and entitled to limitation of liability.<sup>7</sup> The shipowner may agree to waive his right to limit his liability.<sup>8</sup>

## SECTION 9.—REGULATIONS FOR PREVENTING COLLISION AT SEA.

SUBSECTION (1).—*History and Application.*

**1177.** In most cases the question of liability turns on the observance or non-observance of these Regulations. The present statutory warrant for the Orders of Council by which the Regulations are promulgated is the Merchant Shipping Act, 1894, s. 418, and they are of statutory force. The Regulations are truly international, having been adopted by all important maritime nations. They apply to all ordinary seagoing craft of whatever size.<sup>9</sup> They are of force in navigable rivers, such as the Clyde;<sup>10</sup> but while, as is expressly stated in the Regulations,<sup>11</sup> they

<sup>1</sup> Merchant Shipping Act, 1894, s. 503.

<sup>2</sup> 63 & 64 Vict. c. 32.

<sup>3</sup> *Couper v. Mackenzie*, 1906, 8 F. 1202 (fishing boat); *The "Olga" v. The "Anglia,"* 1905, 7 F. 739; [1906] A.C. 489 (proof); *Kennedys v. Clyde Shipping Co., Ltd.*, 1908 S.C. 895 (expenses). Cf. also *MacLean v. Clan Line Steamers*, 1925 S.C. 256.

<sup>4</sup> *The "Ruapehu,"* [1927] P. 47; aff. (H.L.) 1927 W.N. 112.

<sup>5</sup> 61 & 62 Vict. c. 14.

<sup>6</sup> 6 Edw. VII. c. 48.

<sup>7</sup> 1898 Act, s. 71; *Sir John Jackson, Ltd. v. Owners of S.S. "Blanche,"* [1908] A.C. 126.

<sup>8</sup> *The "Satanita,"* [1897] A.C. 59.

<sup>9</sup> See *Gas Float "Whitton"* (No. 2), [1897] A.C. 337, as to what a ship means.

<sup>10</sup> *Little v. Burns*, 1881, 9 R. 118.

<sup>11</sup> Art. 30; see also Merchant Shipping Act, 1894, s. 421.

are subordinate to any special rule duly made by local authority relative to the navigation of any harbour, river, or inland navigation, they apply so far as not inconsistent with the special rules.<sup>1</sup>

**1178.** The present Regulations came into force on July 1, 1897, and differ in various respects from previous Regulations. The statutory Regulations do not apply to His Majesty's ships; but similar Regulations have been made for these ships by Order in Council. At the same time, the legal effect of the fact that the last-named Regulations are not made under the Merchant Shipping Act, 1894, requires to be kept in view, as in certain cases the liability may not be the same in cases with His Majesty's ships as in cases of ships both subject to the statutory Regulations.<sup>2</sup>

#### SUBSECTION (2).—*Lights, Sound Signals, and Speed in Fog.*

**1179.** Articles 1–13 deal with the lights to be carried at night by vessels, including tugs, vessels in tow, fishing vessels, and vessels out of command. Article 14 need not be referred to. Article 15 lays down the sound signals to be given by vessels in a fog, and Article 16 that vessels must in a fog or other thick weather go at a moderate speed and in certain circumstances stop. What is moderate speed depends on the circumstances. "It may be stated as a general rule that speed such that another vessel cannot be seen in time to avoid her is unlawful" (Marsden). On these rules see the cases undernoted.<sup>3</sup> Article 28 lays down the sound signals to be given by vessels when taking a course "authorised or required" by the Regulations. One short blast means that a vessel is directing her course to starboard, two short blasts that she is directing her course to port, and three short blasts that her engines are going full astern. The vessels must be in sight of each other, and the manœuvre taken must be one undertaken in consequence of the Regulations. Article 31 deals with distress signals.

#### SUBSECTION (3).—*Meeting Vessels.*

**1180.** Article 17 deals with the action to be taken by two sailing ships which are approaching one another so as to involve risk of collision. Article 18 lays down that when two steam vessels are meeting end on, or nearly end on, *i.e.* when by day each vessel sees the masts of the other in line with its own, and when by night each vessel sees both side lights of the other, each shall alter its course so as to pass port to port. The rule thus deals with "meeting" as opposed to "crossing" or "overtaking" vessels. As to what is end on, see the case undernoted.<sup>4</sup>

<sup>1</sup> *Little v. Burns*, 1881, 9 R. 118.

<sup>2</sup> See *H.M.S. "Sans Pareil"*, [1900] P. 267; *The "Sutlej"*, 1905, 21 T.L.R. 325.

<sup>3</sup> *The "Campania"*, [1901] P. 289; *The "City of Brooklyn"*, 1876, 1 P.D. 276; *The "Warsaw"*, 1906, 8 F. 1013; *The "James Joicey"*, 1908 S.C. 295.

<sup>4</sup> *Little v. Burns*, *supra*.



SUBSECTION (4).—*Crossing Vessels.*

1181. Article 19 deals with "crossing" vessels. When two vessels are crossing, *i.e.* "when the lines of their courses, being prolonged, intersect," the one having the other on her starboard bow has to keep out of the way of the other. The application of the rule in narrow channels is affected by the narrow channel rule.<sup>1</sup> By Article 20 a steam vessel must always keep out of the way of a sailing vessel. Article 21 provides that where by these rules (Articles 17, 19, and 20) one vessel has to keep out of the way, the other shall keep her course and speed, *i.e.* the "course and speed in following the nautical manœuvre in which, to the knowledge of the other vessel, the vessel is at the time engaged."<sup>2</sup> This rule must be strictly followed, and a "holding on" vessel departing from it must justify her doing so on the ground of imminent danger. As to obedience to the rule, see the cases undernoted.<sup>3</sup>

1182. Article 22 directs that a vessel which has to keep out of the way of another under the rules shall avoid crossing ahead of the other, and Article 23, that such "giving way" vessel shall, if necessary, slacken speed, stop, or reverse. The leading case on Article 23 is *The "Khedive."*<sup>4</sup>

SUBSECTION (5).—*Overtaking Vessels.*

1183. Article 24 enacts that every vessel overtaking another must keep out of the way of the overtaken vessel. An overtaking vessel is one coming up from more than two points abaft the beam of another vessel.<sup>5</sup>

SUBSECTION (6).—*Narrow Channels.*

1184. The "narrow channel rule," namely that in a narrow channel steam vessels are to keep to the starboard side of the channel, is laid down by Article 25. Difficult questions arise as to what is a narrow channel. The Forth, above the Forth Bridge, and the Clyde, above a line drawn from the Cloch Lighthouse to the Gantocks Beacon, have been held to be narrow channels.<sup>6</sup> Article 26 does not need special consideration.

SUBSECTION (7).—*Departure from Rules in Emergency.*

1185. Article 27 provides that regard is to be had to dangers of navigation and collision, and to any special circumstances which may

<sup>1</sup> Article 25, para. 1184 *infra*. Cf. *The "Velocity,"* 1869, L.R. 3 P.C. 44; *The "Pekin,"* [1897] A.C. 532.

<sup>2</sup> *The "Roanoke,"* [1908] P. 231, per Alverstone C.J. at p. 239.

<sup>3</sup> *The "Irmgard and "Strathfillan" (Becker v. Aberdeen Steam Trawling & Fishing Co.),* 1910 S.C. 635; *Compagnie des Forges v. Gibson & Co.,* 1920 S.C. 247.

<sup>4</sup> 1880, 5 App. Cas. 876. Cf. also *Windram v. Robertson,* 1905, 7 F. 665.

<sup>5</sup> Cf. *The "Hilda" v. The "Australia,"* 1884, 12 R. 76.

<sup>6</sup> *Kerr v. Screw Collier Co.,* 1910 S.C. (H.L.) 25; *Clyde Navigation Trs. v. Wilhelmsson,* 1915 S.C. 392.

render departure from the rules necessary in order to avoid immediate danger. Accordingly, steamships were held excused for non-compliance with the then regulation affecting steamships approaching each other so as to involve risk of collision (viz. that they were to slacken speed, or stop and reverse if necessary (Article 18)), if a seaman of ordinary skill and prudence should deem it necessary, with the knowledge he had at the time, to depart therefrom,<sup>1</sup> where the non-compliance afforded the best chance of averting or minimising the results of a collision. Even though in fact the collision was neither averted nor minimised, the same result followed.<sup>2</sup>

#### SUBSECTION (8).—*Miscellaneous Rules.*

**1186.** Article 29 is the "good seamanship" rule. All vessels must be navigated in every way with proper seamanlike care. Article 30 safeguards the application of local rules. There are such local rules in force in the Clyde. As to the meaning of some, there is considerable doubt.<sup>3</sup>

**1187.** The statutory presumption of fault for a breach of the Regulations, which used to exist, was abolished by the Maritime Conventions Act. By the same Act the presumption of fault arising from failure to stand by was also abolished.

In certain cases there is a presumption of fault, *e.g.* against a ship running down a ship at anchor in daylight, or at night, when it is proved the latter had her anchor-light duly burning.<sup>4</sup>

#### SUBSECTION (9).—*Penalties.*

**1188.** Breach of the Regulations not only entails civil consequences, but, as regards the person responsible, certain criminal responsibilities and penalties.<sup>5</sup> By s. 419 of the 1894 Act, an infringement of the Regulations caused by the wilful default of the master or owner is a misdemeanour, and as regards the person in charge of the deck of a ship which causes damage by non-observance of the Regulations there is a presumption of wilful default.<sup>6</sup> The Act provides for prosecutions under it in Scotland.<sup>7</sup>

The Act of 1906<sup>8</sup> introduced certain amendments in procedure.

Further, the certificates of officers of ships may be suspended or cancelled, after inquiry, in cases of collision due to their fault.

**1189.** At common law, in the case of loss of or injury to life or property by wilful or reckless navigation, the master or person in charge or re-

<sup>1</sup> *The "Ceto,"* 1889, 14 App. Cas. 670; see also *The "Khedive,"* 1880, 5 App. Cas. 876; *The "Lancashire,"* [1894] A.C. 1.

<sup>2</sup> *The "Benares,"* 1883, 9 P.D. 16.

<sup>3</sup> Cf. *The "Alconda" and "Bogota,"* 1924 S.C. (H.L.) 66.

<sup>4</sup> *The "Indus,"* 1886, 12 P.D. 46; see also *The "Hilda,"* 1884, 12 R. 76.

<sup>5</sup> Merchant Shipping Act, 1894, ss. 419, 422, 680.

<sup>6</sup> Sec. 419 (2).

<sup>7</sup> Sec. 702 *et seq.*

<sup>8</sup> 6 Edw. VII. c. 48.

sponsible can be indicted criminally, and prosecutions of this kind have several times taken place.<sup>1</sup> Attention may be directed to Lord Young's charge to the jury in the case of *Drever and Tyre*, in the course of which he indicates the extent of fault necessary to ground a conviction.

#### SECTION 10.—MARINE LOSS OR WAR LOSS.

**1190.** During the war, when vessels were sailing in convoys, without lights, questions arose as to whether collisions were due to marine perils or were caused by war risks. Such questions are really in the realm of marine insurance, the point to be decided being whether the marine or war risk underwriters fell to bear the loss. Where two merchant vessels steaming without lights collided owing solely to the absence of lights, the collision was held to be a marine risk,<sup>2</sup> but where the collision was with a warship engaged in active operations it was a war risk.<sup>3</sup> Where in similar circumstances a merchant ship was carrying war stores from one base to another and was sunk by collision with another merchant vessel, it was held to be a war risk.<sup>4</sup>

#### SECTION 11.—TUG AND TOW.

**1191.** In England there has been considerable litigation over the respective liabilities of tug and tow in cases of collision between ships, one of which has been either towing or in tow of another ship. In an insurance case it was assumed that the rules in Admiralty actions in England apply.<sup>5</sup> It is thought that this is so, and these rules may be shortly stated.

**1192.** When a tug and a tow collide with a third ship without fault on the part of the latter: (1) when the collision is with the tug by her fault alone or with the tow by her fault alone, the tug or tow, as the case may be, is alone liable; (2) where the collision is with the tug by the tow's fault, the tow is liable, and the tug is also liable if the manœuvre causing the collision was carried out by her, even though ordered by the tow—each is liable for the whole loss; (3) where the collision is with the tow by the fault of the tug only, the tug is liable and the tow is also liable if it has control of the tug; (4) where both tug and tow are in fault, and either is collided with, both are liable.<sup>6</sup>

Where the other ship is also in fault, the Maritime Conventions Act applies.<sup>7</sup>

<sup>1</sup> See, e.g., *H. M. Advocate v. Drever and Tyre*, 1885, 23 S.L.R. 77.

<sup>2</sup> *British S.S. Co. v. The "Crown,"* 1921 S.C. 99.

<sup>3</sup> *The "Richard de Larrinaga,"* [1921] 2 A.C. 141.

<sup>4</sup> *Commonwealth Shipping Representative v. P. & O. Branch Service*, [1923] A.C. 191. Cf. also *The Attorney-General v. Adelaide Steamship Co.*, [1923] A.C. 292.

<sup>5</sup> *Baine & Johnston v. M'Cowan*, 1890, 17 R. 1016; affd. H.L. [1891] A.C. 401.

<sup>6</sup> Marsden, pp. 201 *et seq.*; *The "Devonshire,"* [1912] A.C. 634; *The "Quickstep,"* 1890, 15 P.D. 196; *The "Niobe,"* 1888, 13 P.D. 55.

<sup>7</sup> *The "Cairnbahn,"* [1914] P. 25.

## SECTION 12.—COLLISION OF SHIPS WITH HARBOURS, OR OTHER OBJECTS NOT SHIPS.

**1193.** In these cases, apart from statute, the rules of the common law apply.

By the Harbours, Docks, and Piers Act, 1847,<sup>1</sup> s. 74, the owner of a ship which damages the harbour or works under charge of the Commissioners acting under an Act incorporating the general Act is answerable for the damage. The meaning of the Act has been the subject of most serious difference of opinion. In the case of *The River Wear Commrs. v. Adamson*<sup>2</sup> it was held by the House of Lords that the owner was not liable for injury to a pier done by his ship due to the act of God; but, as was pointed out in a more recent case in the same House, the reasons for this judgment were of the most varying character.<sup>3</sup> In the case of *The "Mostyn"*<sup>4</sup> it was held that there was liability only if there was negligence on the part of the ship. The latter case settles that the owner is he who is owner at the time expense is incurred, and not the owner at the time of the casualty.<sup>5</sup>

## SECTION 13.—DAMAGES.

**1194.** Damages are ascertained according to the ordinary rules. It has been held that the pursuer is entitled to recover the cost of repairing damage, without any deduction in respect that new materials are substituted for old.<sup>6</sup> Difficult questions arise, in cases of collision, as to how far the loss has been due to the fault of the wrong-doer; or has been aggravated by want of care on the part of those in charge of the injured ship.<sup>7</sup> So also with regard to whether certain damage is too remote to be recovered.<sup>8</sup> Money paid under the Workmen's Compensation Act is not recoverable.<sup>9</sup> As these questions fall to be determined by the ordinary rules in actions of reparation, they are not fully considered here. It may be mentioned that in England it has not been the practice to give damages for loss of market to cargo on board a ship injured by collision.<sup>10</sup> See, as to average contribution, *The "Marpessa."*<sup>11</sup> Damages are given for loss of profit on a charter annulled through delay due to collision;<sup>12</sup> also in respect of loss of earnings of a fishing boat.<sup>13</sup>

**1195.** Where a dredger belonging to a public harbour Board was damaged, more than nominal damages were allowed for loss of the use

<sup>1</sup> 10 & 11 Vict. c. 27.

<sup>2</sup> 1877, 2 App. Cas. 743.

<sup>3</sup> *The Ship "Crystal,"* [1894] A.C. 508, per L. Herschell.

<sup>4</sup> 1926, 42 T.L.R. 288.

<sup>5</sup> But see *Howard Smith & Sons v. Wilson*, [1896] A.C. 579; *Barraclough v. Brown & Or.*, [1897] A.C. 615.

<sup>6</sup> *The "Gazelle,"* 1844, 2 W. Rob. 279; *The "Pactolus,"* 1856, Swa. 173.

<sup>7</sup> *The "Baron Vernon" and "Metagama,"* 1927, S.N. 22.

<sup>8</sup> *The "Bodlewell,"* [1907] P. 286.

<sup>9</sup> *The "Molière,"* 1924, 41 T.L.R. 151.

<sup>10</sup> *The "Nighting Hill,"* 1881, 9 P.D. 105.

<sup>11</sup> [1891] P. 403.

<sup>12</sup> *The "Star of India,"* 1876, 1 P.D. 466.

<sup>13</sup> *The "Risoluta,"* 1883, 8 P.D. 109.



of the dredger, although precise proof of loss was wanting.<sup>1</sup> So in similar cases at the instance of private parties.<sup>2</sup> As to dock dues where the ship has been dry docked, and their apportionment in cases where work has been done not only to repair collision damages but for the owner's own purposes, reference may be made to the cases undernoted.<sup>3</sup> As to the date from which interest is payable, and as to averments of damage generally, cf. *The "Vitruvia."*<sup>4</sup>

#### SECTION 14.—COSTS.

**1196.** In collision actions, where both ships are held in fault, the usual rule is to give no costs to either party; but this rule is affected by an admission, or tender of admission, of fault or part fault on the part of either ship. Where one ship is held to be in fault to a greater degree than the other, e.g. three-fourths and one-fourth, there would appear to be no reason why the Court should not apportion the costs accordingly. In England costs have been so apportioned in special cases.

#### SECTION 15.—NAUTICAL ASSESSORS.

**1197.** In cases of collision the Courts may have the aid of nautical assessors.<sup>5</sup> In actions of damages for loss of life or personal injury from collision, the Courts have more than once exercised their discretion, by appointing the case to be heard by a judge with the assistance of a nautical assessor, and not by a jury.<sup>6</sup> Where there is a nautical assessor, the Courts will follow the English practice and not admit expert evidence.<sup>7</sup>

#### SECTION 16.—INSURANCE.

**1198.** The underwriters on an ordinary policy are liable for injury by collision to the ship insured, though due to the fault of those in charge of her; but no claim lies against them in respect of claims by another ship against the ship insured. The universal practice now is to make provision for this case by a clause known as the running-down clause, whereby, according to an ordinary form, the underwriters agree that if the ship insured comes into collision with any other ship, and the assured shall in consequence become liable to pay any sum not exceeding a limit stated in the clause, the underwriters will pay such proportion of three-fourths of the sum paid as their subscriptions bear to the insured value of the ship. Provision is also made as to costs, and claims for

<sup>1</sup> *The "Greta Holme,"* [1897] A.C. 596; *The "Marpessa,"* [1907] A.C. 241; *The "Chekiang,"* 1926, 42 T.L.R. (H.L.) 634.

<sup>2</sup> *The "Mediana,"* [1900] A.C. 113.

<sup>3</sup> *The "Haversham Grange,"* [1905] P. 307; *The "Acanthus,"* [1902] P. 17.

<sup>4</sup> 1923 S.C. 574; 1924 S.C. (H.L.) 31.

<sup>5</sup> Nautical Assessors (Scotland) Act, 1894. See *The "König Wilhelm II.,"* [1908] P. 125 (C.A.).

<sup>6</sup> *Leadbetter v. The Dublin and Glasgow Steam Packet Co.,* 1907 S.C. 538.

<sup>7</sup> *The "Alconda" and "Bogota,"* 1923 S.C. 526, per Lord Hunter at p. 542.

loss of life or personal injury are excluded. In a Scottish case it was held that life claims were covered by the clause unless excluded;<sup>1</sup> but the contrary has been held in England,<sup>2</sup> and it is thought the case of *Coey* would not be followed. It has been held that this clause makes the underwriters responsible for their proportion of the loss due to collision between the tug of a ship insured and a third ship for which the owners of the ship insured were responsible.<sup>3</sup>

It is the practice of the shipowner to cover himself in respect of collision, so far as the ordinary policy with running-down clause does not protect him, by entering the ship with a protection club.

*Note.*—Scottish cases have been quoted wherever applicable, rather than English; but the cases in England have been much more numerous, and should always be referred to.

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<sup>1</sup> *Coey v. Smith*, 1860, 22 D. 955.

<sup>2</sup> *Taylor v. Dewar*, 1864, 5 B. & S. 58.

<sup>3</sup> *Baine & Johnston v. M'Cowan*, 1890, 17 R. 1016; [1891] A.C. 401. See *The "Commonwealth,"* [1907] P. 16 (C.A.), for a case illustrating the underwriters' right of subrogation in a question with the owner.

# COLLISION ON LAND.

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## INTRODUCTION.

**1199.** The law of negligence and contributory negligence is applicable in general to collisions on land (*see* NEGLIGENCE). It is essential for the pursuer of an action of damages for injury sustained in a collision to shew that the collision was caused by the negligence of the defender or of those for whom he is responsible. The onus is on the pursuer to prove fault, and not on the defender to prove unavoidable accident.<sup>1</sup>

**1200.** The fact of a collision between two vehicles on the open road, if not otherwise explained by some special circumstance, is by itself relevant to infer negligence on the part of one or both of the drivers of the colliding vehicles.<sup>2</sup> So where a collision has occurred between two vehicles, and a member of the public has been injured, if fault on the part of one vehicle be negatived the other will be held liable, in the absence of a satisfactory explanation of its movements.<sup>3</sup>

**1201.** Where there has been contributory negligence on the part of the pursuer, the question to be decided is, whose was the last act of negligence.<sup>4</sup> But only where a clear line can be drawn between the respective acts of negligence is there room for the rule to be applied that it is the subsequent act of negligence which fixes liability.<sup>5</sup> A person travelling in a vehicle in collision is not so identified with the

<sup>1</sup> *Alexander v. Phillip*, 1899, 1 F. 985.

<sup>2</sup> *M'Crae v. Bryson*, 1923 S.C. 896, L. P. Clyde at p. 901.

<sup>3</sup> *Milliken v. Glasgow Corporation*, 1918 S.C. 857.

<sup>4</sup> *British Columbia Electric Railway Co. v. Loach*, [1916] 1 A.C. 719.

<sup>5</sup> *Admiralty Commissioners v. Owners of S.S. "Volute,"* [1922] 1 A.C. 129.

driver of his vehicle as to be debarred from recovering from the other vehicle by the contributory negligence of his own driver.<sup>1</sup>

## PART I.—COLLISIONS ON THE HIGHWAY.

### SECTION 1.—CONSTRUCTION OF VEHICLE.

**1202.** Those who drive vehicles on the highway are responsible for seeing that they are properly constructed, and must take reasonable care to have them in a fit condition for the purpose for which they are used. A defender is liable for accidents arising from the faulty construction of his vehicle.<sup>2</sup> Thus averments that an accident was due to the faulty construction of a tramcar, in respect that there were no guards covering the space between the front and rear wheels, were held relevant. Similarly, fault was relevantly averred where it was stated that the railings on the top of a tram did not conform to a by-law of the magistrates which regulated their minimum height.<sup>3</sup> The construction of the vehicle must not be such as to obstruct the driver's view of the road, which must be as unobstructed as is reasonably possible. It was held that a Board of Trade by-law, which provided that tramcars "shall be so constructed as to enable the driver to command the fullest possible view of the road," was not transgressed by a tramcar whose staircase shut out from the driver's view a small part of the road.<sup>4</sup>

### SECTION 2.—ANIMALS USED FOR TRACTION.

**1203.** Similarly, owners of vehicles are responsible for the animals they use, and must take the consequences of employing a vicious or restive animal. But no case of negligence is disclosed if an accident be caused by the sudden stoppage of a horse, unless it be averred and proved that the animal is vicious. "It would be a very different case, and one calling for enquiry, if it was averred that a horse was given to shying or bolting or jibbing."<sup>5</sup>

### SECTION 3.—UNATTENDED VEHICLES.

**1204.** In every case it is a question of circumstances whether the driver of a horse and cart, who leaves them unattended in a public place, is guilty of negligence.<sup>6</sup> A well-known English *dictum*<sup>7</sup> on this subject, that "if a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done," is too sweeping in its terms to be of general application. The circumstances of the case must

<sup>1</sup> *The "Bernina,"* 1888, 13 A.C. 1. Cf. *Bruce v. Murray*, 1926, S.L.T. 236 (husband and wife).

<sup>2</sup> *Gibb v. Edinburgh and District Tramways Co., Ltd.*, 1912 S.C. 580.

<sup>3</sup> *Suttie v. Edinburgh and District Tramways Co., Ltd.*, 1910, 1 S.L.T. 125.

<sup>4</sup> *Cass v. Edinburgh and District Tramways Co., Ltd.*, 1909 S.C. 1068.

<sup>5</sup> *Watson v. Wordie & Co.*, 1906, 8 F. 876, see Lord Justice-Clerk Macdonald at p. 880.

<sup>6</sup> *Hendry v. McDougall*, 1923 S.C. 378.

<sup>7</sup> *Tindal C. J. in Illidge v. Gordon*, 1831, 5 C. & P. 190.



amount to fault on the part of the defender. When a horse is left unattended in a public place, and it bolts and injures a member of the public, the onus is on the person in charge of the horse to shew that he was not negligent.<sup>1</sup> Much will depend on the type of horse, the time during which the driver is absent, the distance to which he goes, and the character of the locus. The mere fact of leaving a horse and cart unattended is not sufficient to infer liability.<sup>2</sup>

1205. By statute the driver of any vehicle is liable to a penalty if he leave it on any county highway "without any proper person in the sole custody or care thereof longer than may be necessary to load or unload the same."<sup>3</sup> A proved breach of this statute will not, however, infer liability against the driver of a motor car if the circumstance of its being left unattended was not in fact the cause of the accident.<sup>4</sup>

1206. The man in charge should be in a position to control his horse, but the duty must be considered in reference to the circumstances in which he and the vehicle are placed. There was held to be no fault where a cab-horse ran away while the driver was restoring the horse's nosebag to a place where it was kept ten feet from the horse's head.<sup>5</sup> The driver should not place himself in such a position that he cannot readily get at his horse's head.<sup>6</sup> A general averment of carelessness is not enough to infer fault.<sup>7</sup>

#### SECTION 4.—LOOKOUT.

##### SUBSECTION (1).—*General Duty.*

1207. The driver of a vehicle on the highway must keep a careful lookout. "The primary duty of the driver of a vehicle is to look ahead."<sup>8</sup> It is his duty to look out for and to avoid foot-passengers, and this has been described as "the primary obligation" imposed on a driver. So foot-passengers on a country road with footpaths on either side are entitled to walk in the roadway, and drivers must keep clear.<sup>9</sup> A driver must use reasonable care to occupy a position from which he can keep a proper lookout and thus avoid foot-passengers.<sup>10</sup> Where a collision occurred at night between a foot-passenger and a tramway car, and the pedestrian was quite unable to account for the event, it was held that, an unexplained collision having occurred, the judge who tried the

<sup>1</sup> *Hendry v. M'Dougall*, 1923 S.C. 378.

<sup>2</sup> *M'Ewen v. Cuthill*, 1897, 25 R. 57.

<sup>3</sup> The Roads and Bridges (Scotland) Act, 1878 (41 & 42 Vict. c. 51), s. 123, adopting the General Turnpike Act, 1831 (1 & 2 Will. IV. c. 43), s. 96.

<sup>4</sup> *Macfarlane v. Colam*, 1908 S.C. 56.

<sup>5</sup> *Shaws v. Croall & Sons*, 1885, 12 R. 1186.

<sup>6</sup> *Milne & Co. v. Nimmo*, 1898, 25 R. 1150; *Morrison v. M'Ara*, 1896, 23 R. 564; *M'Intosh v. Waddell*, 1896, 24 R. 80.

<sup>7</sup> *Smith v. Wallace & Co.*, 1898, 25 R. 761.

<sup>8</sup> Lord Salvesen in *Watson v. Wordie & Co.*, 1906, 8 F. 876 at p. 878.

<sup>9</sup> *McKechnie v. Cooper*, 1887, 14 R. 345.

<sup>10</sup> *Grant v. Glasgow Dairy Co.*, 1881, 9 R. 182.

case might properly infer that it was due to faulty lookout by the driver.<sup>1</sup> There was evidence that the night was clear, and that the driver of the car did not see a cow driven by the pursuer until he was within three yards of it.

When the driver of a vehicle drives over a person in broad daylight, there is the strongest possible presumption both in fact and in law, that the driver was in fault.<sup>2</sup> The same rule applies to the case of a runaway horse and carriage.<sup>3</sup> In such cases as these the onus is on the driver to shew that he is not in fault.<sup>4</sup>

#### SUBSECTION (2).—*Animals on Road.*

**1208.** The duties of keeping a proper lookout and of driving carefully are incumbent on the driver of a vehicle in regard not only to other vehicles and foot-passengers, but to animals. He must keep a lookout for any kind of animal, being a subject of property, that may be on the road.<sup>5</sup> Cattle, sheep, swine, and the like, are all entitled to protection, and anyone negligently colliding with them is liable. The owner of sheep owes no duty to the public to prevent them straying on the high road, and he is not liable in respect of damage which may be caused to users of the road by reason of their presence there. A sudden rush of sheep across the road must be regarded as one of the ordinary risks to which persons using the road are exposed; it is an accident for which no one is to blame.<sup>6</sup> Similarly, the tendency of the Court in England is towards denying a duty on the part of owners of fowls to keep them off the highway.<sup>7</sup>

**1209.** It was long doubted if there were liability for negligently running over a dog, on the ground that the dog is a mobile animal, well able to look out for itself. But it has been held that a driver's lookout must be sufficiently careful to include this class of animal, and the protection afforded them does not cover only those occasions when they are using the highway for the normal purposes of passage.<sup>8</sup> In the case of collision between dog and cyclist, the owner of the animal is not liable in damages unless he had previous knowledge of its dangerous propensities.<sup>9</sup>

#### SUBSECTION (3).—*Cross-Roads.*

**1210.** A proper lookout and careful driving are nowhere more incumbent on the drivers of vehicles than in cases where one road

<sup>1</sup> *Craig v. Glasgow Corporation*, 1919 S.C. (H.L.) 1.

<sup>2</sup> *Clerk v. Petrie*, 1879, 6 R. 1076.

<sup>3</sup> *Snee v. Durkie*, 1903, 6 F. 42.

<sup>4</sup> *Anderson v. Blackwood*, 1886, 13 R. 443.

<sup>5</sup> *Davies v. Mann*, 1842, 10 M. & W. 546.

<sup>6</sup> *Fraser v. Pate*, 1923 S.C. 748; *Heath's Garage, Ltd. v. Hodges*, [1916] 2 K.B. 370.

<sup>7</sup> *Hailwell v. Righton*, [1907] 2 K.B. 345.

*Graham v. Edinburgh and District Tramways Co., Ltd.*, 1917 S.C. 7.

<sup>9</sup> *Milligan v. Henderson*, 1915 S.C. 1030.

intersects another, or where one road joins another at an angle. The respective duties of drivers on main roads and side roads have frequently been considered by the Court, and the following principles may be extracted from the judgments. It is the business of those who are on the side road and going to cross the main road to look out when they enter the main road, and to give way to the traffic which is coming along the main road. The side road user must approach the main road at such a pace as to have his car under proper control, and must be prepared for whatever he finds on the main road.<sup>1</sup> But while it is the duty of vehicles approaching a main road to give way to vehicles on the main road, this rule does not absolve vehicles on the main road from the duty of approaching the entrance to the side road with caution.<sup>2</sup>

**1211.** The doctrine, favoured in earlier cases, that there is a higher duty of care imposed on drivers approaching from a side road than on those driving on the main road, has now been disapproved. It has been pointed out that the distinction between main and side road is variable and uncertain. Such preference as is allowed to traffic on a main road involves no right on its part to refuse, by maintaining course and speed, to accommodate the entry of the side road vehicle, notwithstanding that its presence and intention are well known. There is no justification for the idea that the traffic whose current is disturbed by an incoming vehicle is absolved in law from the duty of itself using care to avoid collision with the incoming vehicle, once its presence is made known.<sup>3</sup> Further, the adoption of appropriate methods of care by a side road vehicle seeking to leave the side road, and join the regular current of traffic in a main road, is equally incumbent on a vehicle in the main road seeking to leave it and to join the sparser current of traffic on a side road.<sup>4</sup>

**1212.** The rule imposing caution on a driver who passes from a side road on to a main road “applies with greater force to the case of a mere gateway, out of which, as a rule, traffic emerges less frequently than out of a cross-road, and which is not itself so visible to other drivers coming along as a cross-road.”<sup>5</sup> There is thus a duty laid on drivers emerging from gateways, etc., on to a road to maintain a careful look-out for traffic on the road, and to give way to it when necessary.

#### SECTION 5.—SPEED.

**1213.** It is the duty of those in charge of vehicles on a highway to drive them at a moderate speed. By statute no one may drive a motor car on a public highway at a speed exceeding twenty miles per hour.<sup>6</sup>

<sup>1</sup> *Macandrew v. Tillard*, 1909 S.C. 78.

<sup>2</sup> *Robertson v. Wilson*, 1912 S.C. 1276; *M'Allester v. Glasgow Corporation*, 1917 S.C. 430.

<sup>3</sup> *M'Nair v. Glasgow Corporation*, 1923 S.C. 397.

<sup>4</sup> *M'Nair*, *supra*.

<sup>5</sup> *Campbell v. Train*, 1910 S.C. 556, Lord Justice-Clerk Macdonald at p. 559.

<sup>6</sup> Motor Car Act, 1903 (3 Edw. VII. c. 36), s. 9.

But it has been held that breach of statutes and statutory orders does not necessarily infer fault on the part of a contravener, so as to involve him in liability for damages if an accident occurs.<sup>1</sup> The same considerations would doubtless apply to infringements of regulations as to speed.

**1214.** What constitutes moderate or excessive speed depends on the circumstances of each particular case. The legal limit of twenty miles per hour does not seem to have much bearing upon the question. A safe speed to approach a crossing should in many cases be a great deal less than twenty miles per hour, and in some cases "a speed of more than about two or three miles an hour is unsafe."<sup>2</sup> In another case it was held that a motor car went too fast in passing a led horse at a speed of eighteen miles per hour.<sup>3</sup> The speed should in general not be so great that a driver cannot pull up his vehicle in time to avoid an accident.<sup>4</sup>

#### SECTION 6.—LIGHTS.

**1215.** During the hours of darkness a vehicle must be lighted so as to give to foot-passengers and other vehicles reasonable notice of its position on the highway. At common law there is no absolute obligation on a vehicle to carry lights when travelling at night, but it is a precaution which should be taken, and failure to take it may involve the driver of an unlighted vehicle in liability for damages.<sup>5</sup>

**1216.** The common law on the lighting of vehicles has been reinforced by various statutory enactments. In burghs all vehicles are required to carry lights between one hour after sunset and one hour before sunrise, subject to penalty for infringement.<sup>6</sup> Again, motor cars are required by statutory order to "exhibit" during the same period "a white light, visible within a reasonable distance in the direction towards which the motor car is proceeding. The lamp shall be placed on the extreme right or off-side of the motor car in such a position as to be free from all obstruction to the light."<sup>7</sup> A motorist was held in fault for not having his off-side light burning and for thereby causing a collision with a cyclist who by this omission was induced to think that what he was approaching was another bicycle.<sup>8</sup> Lights must not be such as to mislead.<sup>9</sup>

#### SECTION 7.—CAREFUL DRIVING.

**1217.** Besides keeping a proper look-out, the driver of a vehicle must drive carefully, with reasonable skill and prudence, and keep his vehicle

<sup>1</sup> *Pressley v. Burnett*, 1914 S.C. 874 (lights); *Macfarlane v. Colam*, 1908 S.C. 56 (leaving motor car unattended).

<sup>2</sup> *Macandrew v. Tillard*, 1909 S.C. 78.

<sup>3</sup> *Umphray v. Ganson Bros.*, 1917 S.C. 371.

<sup>4</sup> *Anderson v. Blackwood*, 1886, 13 R. 443.

<sup>5</sup> *Gibson v. Milroy*, 1879, 6 R. 890.

<sup>6</sup> Burgh Police (Scotland) Act, 1903 (3 Edw. VII. c. 33), s. 50.

<sup>7</sup> Motor Cars (Use and Construction) (Scotland) Order, 1904, Art. II. (7) (1), in pursuance of the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 2.

<sup>8</sup> *Pressley v. Burnett*, 1914 S.C. 874.

<sup>9</sup> *Tait v. Trotter & Sons*, 1917 S.C. 378.



under control. The vehicle must be so far under control that the driver can manœuvre it in any way necessary to secure his own safety or that of others. Thus it was held faulty driving on the part of a motorist emerging from a side road on to a main road, not to be able to turn sharp round to his left on reaching the main road ; had he done so he would have saved a collision with a vehicle travelling on the main road.<sup>1</sup> At night in particular there is an obligation on a driver to proceed with caution, and to have his vehicle under proper control, especially if the night be a dark one.<sup>2</sup>

1218. The driver of a vehicle must proceed so that he can keep himself clear of incidents arising on the road from the presence of another vehicle. Thus an omnibus was held to be in fault for following another so closely that it could not avoid running over a child who fell while running after the leading vehicle.<sup>3</sup> In the same case it was observed that drivers, as an incident inseparable from their occupation, must take into account the disposition of boys and girls to get in the way.<sup>4</sup>

1219. Again, a driver is guilty of want of care if he drives his vehicle from such a position that he cannot exercise the requisite control, *e.g.* seated on the shafts of a milk-cart and not on the raised driving-seat.<sup>5</sup> Failure to exercise the requisite control may also be illustrated by omission to apply brakes in time.<sup>6</sup> A cyclist must have his machine under such control that he can pull up readily if there is danger of an accident. If his view becomes obstructed he should dismount or at all events proceed more slowly.<sup>7</sup>

#### SECTION 8.—WARNING OF APPROACH.

1220. Another duty incumbent on the careful driver is that of giving warning of his approach. In the case of motor cars and light locomotives the duty is statutory. The driver of such a vehicle must be provided with a bell or other instrument capable of giving audible and sufficient warning of the approach or position of the vehicle.<sup>8</sup> Although failure to give warning by such means is an almost invariable averment in collision cases, few cases turn wholly on this point, and the matter has never been the subject of elaborate judicial exposition. It is quite clear, however, that no driver will be excused from the consequences of negligent driving by the mere fact that he blew his horn at or shortly before the critical moment. In other words, an intelligent use of the horn or other method of warning must always be combined with a

<sup>1</sup> *Macandrew v. Tillard*, 1909 S.C. 78, see also *Robertson v. Wilson*, 1912 S.C. 1276.

<sup>2</sup> *Gibson v. Milroy*, 1879, 6 R. 890.

<sup>3</sup> *Auld v. M'Bey*, 1881, 8 R. 495.

<sup>4</sup> See also *Alexander v. Phillip*, 1899, 1 F. 985.

<sup>5</sup> *Grant v. Glasgow Dairy Co.*, 1881, 9 R. 182.

<sup>6</sup> *M'Dermid v. Edinburgh Street Tramways Co.*, 1884, 12 R. 15.

<sup>7</sup> *Foster v. Rintoul*, 1891, 28 S.L.R. 636.

<sup>8</sup> Motor Cars (Use and Construction) (Scotland) Order, 1904, Art. IV. (5), following the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 3.

proper control of the vehicle. There is no duty on the part of a motor-driver to blow his horn in broad daylight in order to warn the driver of another car who has had the opportunity of seeing him for a considerable distance.<sup>1</sup>

## SECTION 9.—RULE OF THE ROAD.

### SUBSECTION (1).—*Meeting and Overtaking.*

**1221.** Those in charge of vehicles on the highway must observe what is known as the rule of the road. In passing another vehicle which comes to meet him, the driver must keep to the left or near side of the road; in overtaking another vehicle which is going in his own direction he must keep to the right or off-side of that vehicle. This is common law, and it is reinforced by statutory enactment, with regard both to road traffic in general,<sup>2</sup> and to motor cars in particular.<sup>3</sup> The driver of the latter “shall when meeting any carriage, horse, or cattle keep the motor car on the left or near side of the road, and when passing any carriage, horse, or cattle proceeding in the same direction keep the motor car on the right or off-side of the same.”

**1222.** “In theory the rule of the road is this: the highway is divided into two parts, half of it being appropriated to the traffic going one way, and half to the traffic going the other way. When the two traffics meet they are bound to keep each other on the whip or right side; thus each is restricted to one half of the highway.”<sup>4</sup> In regard to overtaking, the duty on the part of the vehicle overtaken is to keep to its left or near side. “The rule of the road is that, if the way in front of you is obstructed by a vehicle going in the same direction as you are, and at a slower rate, the slower travelling vehicle must keep to the left, so as to allow you to pass it on its right.”<sup>5</sup>

**1223.** As regards the overtaking of animals, it is the duty of a motor-driver when overtaking or passing a led horse to give the animal as wide a berth as is compatible with due regard to the safety of the car, and to exercise all reasonable care and caution in manœuvring it while passing the horse.<sup>6</sup> It has been suggested, but not decided, that despite the wording of the Motor Cars Order of 1904, the correct course in these cases is for the man leading the horse to cross to the off-side of the road and allow the car to pass.<sup>7</sup>

**1224.** The rule of the road only applies where there is more than one vehicle on the road. There is a general rule that traffic is entitled to

<sup>1</sup> *Wallace v. Bergius*, 1915 S.C. 205.

<sup>2</sup> Roads and Bridges (Scotland) Act, 1878 (41 & 42 Vict. c. 51), s. 123, which incorporates into Scots Law the General Turnpike Act, 1831 (1 & 2 Will. IV. c. 43), s. 97.

<sup>3</sup> Motor Cars (Use and Construction) (Scotland) Order of 1904, Art. IV. (3).

<sup>4</sup> Lord Justice-Clerk Moncreiff in *Ramsay v. Thomson & Sons*, 1881, 9 R. 140 at p. 145.

<sup>5</sup> *Ibid.*, Lord Young at p. 147. For the general rule, see also *Jardine v. Stonefield Laundry Co.*, 1887, 14 R. 839.

<sup>6</sup> *Umphray v. Ganson Bros.*, 1917 S.C. 371.

<sup>7</sup> *Ibid.*, per Lord Mackenzie at p. 376.

occupy any part of a road in the absence of competing traffic. In other words, driving on a particular side is a matter entirely within the discretion of the driver, except when he has to overtake or meet another vehicle; in that case he must conform to the rule of the road.<sup>1</sup> When a driver chooses to drive on any other part of the road than the correct side, he comes under an obligation to keep a sharper lookout.<sup>2</sup> Again, the general rule that in the absence of competing traffic a driver may proceed on any part of the road does not apply to a vehicle approaching a blind corner, on a public highway, especially in view of the conditions of modern rapid traffic.<sup>3</sup> Where a special track had been laid down on a hill to ease the gradient which involved driving at one part of it "on the wrong side," a driver was found entitled to make use of it, and no fault was attributable to the authorities who laid the track.<sup>4</sup>

#### SUBSECTION (2).—*Emergencies.*

1225. Even where vehicles have occasion to meet on a highway, the rule of the road is not of rigid application. A driver may be held free of fault for a collision which occurs when he is on the wrong side. The driver of a motor car is in the same position as the master of a ship in this respect, that if at the last moment he reasonably judges that a collision is absolutely inevitable unless he does something to avoid it, he will be justified in taking a course which involves going to the wrong side of the road.<sup>5</sup> Where a collision occurs a driver may by his own conduct debar himself from insisting on a strict application of the rule of the road. "When the pursuer by his own misconduct places the opposing vehicle suddenly and unexpectedly in a position of great difficulty, he may disentitle himself from attributing to the driver of that vehicle anything more than an excusable error in judgment made in circumstances in which it would be unfair to apply the strict standard of traffic conduct which applies in ordinary circumstances."<sup>6</sup> Drivers of such locomotives as traction-engines must give as much space as possible for the passing of other traffic.<sup>7</sup>

#### SUBSECTION (3).—*Tramways.*

1226. An important exception to the normal rule of the road is constituted by the use of tramways. "The effect of legalising a tramway line in the centre of the road is to place a permanent obstruction on that part of the road, and it must be dealt with as such."<sup>8</sup> Accord-

<sup>1</sup> *Christie v. Glasgow Corporation*, 1927, S.L.T. 215, per Lord Pres. Clyde at p. 218; *Ramsay v. Thomson*, *supra*, per Lord Young at p. 147.

<sup>2</sup> *Wallace v. Bergius*, 1915 S.C. 205.

<sup>3</sup> *Barty v. Harper & Sons*, 1922 S.C. 67.

<sup>4</sup> *Scott v. Glasgow Police Commissioners*, 1894, 21 R. 466.

<sup>5</sup> *Wallace v. Bergius*, *supra*.

<sup>6</sup> *Barty v. Harper & Sons*, *supra*, per Lord Pres. Clyde at p. 69.

<sup>7</sup> Locomotives Act, 1865 (28 & 29 Vict. c. 83), s. 3; *Tait v. Trotter & Sons*, 1917 S.C. 378.

<sup>8</sup> Lord Justice-Clerk Moncreiff in *Ramsay v. Thomson*, 1881, 9 R. 140, at p. 145.

ingly, when a vehicle is coming up behind a tramway car and intends to pass it, the driver should pass on the left or near side. "If vehicles were to pass a car on the right-hand side, there would be very great danger of their coming into collision with another car coming the opposite way. That is the reason of the rule."<sup>1</sup> But it is not negligence to pass a tramway car on the off side if the road be otherwise unobstructed.<sup>2</sup> Moreover, the tramway company's use of its track is not exclusive. Any other vehicle may use the track and the rails as freely as any other part of the street, whenever and so long as these are not actually used by the cars.<sup>3</sup> It must be recognised also that vehicles other than tramcars must occasionally stop on the tramway lines, and the driver of a tramcar is bound to act on the rules which govern the ordinary traffic of the streets.<sup>4</sup> The tramway company's monopoly in the use of the lines is, therefore, subject to this important qualification, that the lines being laid down in the public thoroughfare the company is bound to use them in a way consistent with the conditions of public traffic.

## PART II.—COLLISIONS ON RAILWAYS.

### SECTION 1.—CONDITION OF VEHICLE.

**1227.** It is the duty of those who convey passengers by rail to see that all their apparatus, including the vehicles in which the passengers are carried, is kept in good order and worked without negligence. In a contract to carry passengers by railway, if an accident occurs through a breakdown of the plant, the presumption is that it is the fault of the railway company.<sup>5</sup> But while the railway company's duty is to take due care (including in that term the use of skill and foresight) to carry its passengers safely, there is no warranty that the carriage in which they travel shall be in all respects perfect for its purpose, that is to say free from all defects likely to cause peril, although these defects were such that no skill, care, or foresight could have detected their existence.<sup>6</sup>

### SECTION 2.—LEVEL-CROSSINGS.

#### SUBSECTION (1).—*Gates.*

**1228.** Both by statute and at common law certain duties are imposed on railway companies where their line crosses highways on the level. By statute it is the company's duty where the line crosses a public high-

<sup>1</sup> L. P. Inglis in *Jardine v. Stonefield Laundry Co.*, 1887, 14 R. 139 at p. 140.

<sup>2</sup> *Christie v. Glasgow Corporation*, 1927, S.L.T. 215.

<sup>3</sup> *Ogston v. Aberdeen Tramways Co.*, 1896, 24 R. (H.L.) 8, per Lord Watson at p. 13.

<sup>4</sup> *McDermid v. Edinburgh Street Tramways Co.*, 1884, 12 R. 15.

<sup>5</sup> *Watson v. North British Rly. Co.*, 1876, 3 R. 637.

<sup>6</sup> *Readhead v. Midland Railway Co.*, 1869, L.R., 4 Q.B. 379.



way on the level to erect and maintain gates ; the company is responsible for these gates being securely closed save when it is necessary to open them to permit the passage of road-users. When the railway crosses a footway on the level, the company's duty is to maintain good and sufficient gates or stiles.<sup>1</sup> The common law of railway level-crossings may be stated in general to be that the company is bound to take all reasonable precautions to protect the public, who are entitled to make use of a crossing, against the danger which is necessarily incident to such use, and that the precautions to be taken depend very largely on the circumstances of each particular case. It was held not to be negligent for a company to leave a wicket-gate constantly open for foot-passengers, without posting someone to warn them of the approach of trains.<sup>2</sup>

**1229.** Where there is an unobstructed view of approaching trains, the foot-passenger must keep a lookout, and use his eyes as well as his ears.<sup>2</sup> But it has been said in the House of Lords that "one is not to be held as having caused or contributed to his own death by crossing a line in a manner *prima facie* dangerous and imprudent if there is evidence of acts or omissions on the part of the company by which he might have been put off his guard, and led to suppose that he might safely act as he did." <sup>3</sup> It is just to guard against the effects of such negligence that statutory precautions are made incumbent on the railway companies ; so where the defenders did not observe a clear statutory duty of providing locked gates across the carriage road, the absence of such gates was held to imply that the line might be safely crossed.<sup>4</sup> In the absence of such gates, or in the case of failure to use them, the company will be responsible for resulting accident, even if an employee was engaged in warning road-users of the danger.<sup>5</sup> Quite apart from the question of gates, it is necessary to call the attention of foot-passengers using level-crossings to the dangers they are running.<sup>6</sup> But railway companies are not bound to adapt their regulations to the case of very young children, or of people who are deaf or blind, or otherwise incapable of taking care of themselves. They should accommodate their working to the average condition of the human being.<sup>7</sup>

**1230.** Statutory obligations to fence, etc., apply only to public companies having compulsory powers, and not to private railways.<sup>8</sup> "A farm road level-crossing" was held not to be a public footway within the meaning of the Railway Clauses Act of 1845.<sup>9</sup> A colliery

<sup>1</sup> Railway Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 33), s. 40 (public highways), s. 52 (footways).

<sup>2</sup> *Hendrie v. Caledonian Rly. Co.*, 1909 S.C. 776.

<sup>3</sup> *Dublin, Etc., Rly. Co. v. Slattery*, 1878, 3 App. Cas. 1155, per Lord Selborne at p. 1193.

<sup>4</sup> *Gilchrist v. Ballochney Rly. Co.*, 1850, 12 D. 979.

<sup>5</sup> *Woods v. Caledonian Rly. Co.*, 1886, 13 R. 1118.

<sup>6</sup> *Ireland v. North British Rly. Co.*, 1882, 10 R. 53.

<sup>7</sup> *Grant v. Caledonian Rly. Co.*, 1870, 9 M. 258.

<sup>8</sup> *Matson v. Baird & Co.*, 1878, 5 R. (H.L.) 211.

<sup>9</sup> *Barclay v. Great North of Scotland Rly. Co.*, 1882, 10 R. 144.

company which runs a chain of hutches across a road at a level-crossing must take sufficient precautions to warn the public.<sup>1</sup>

At a level-crossing in a station, although a railway company is not bound to erect a footbridge to give access from one platform to another, and want of such a bridge will not *per se* infer liability, absence of such a precaution throws a greater onus on the company to provide for the safety of the public.<sup>2</sup>

#### SUBSECTION (2).—*Whistling.*

**1231.** There is no direct rule in law which compels the driver of a train approaching a level-crossing to sound his whistle. But, looking to the danger present at such crossings, and to the duty of the railway company to exercise all reasonable care, caution, and skill in order to protect the public crossing the line at so dangerous a place, it is a usual and reasonable precaution to whistle.<sup>3</sup> Railway company's rules almost invariably impose this duty on engine-drivers approaching a level-crossing. An engine approaching a level-crossing on a dark night should always whistle, and likewise one going on an unusual errand.<sup>4</sup>

#### SUBSECTION (3).—*Speed.*

**1232.** It is not in accordance with any known rule that an engine should slacken speed on approaching a level-crossing.<sup>5</sup>

#### SUBSECTION (4).—*Lights.*

**1233.** There is no case in Scotland bearing directly on the necessity, or otherwise, of an engine being lighted as it approaches a level-crossing at night, with a view to warning foot-passengers, but *dicta* in England point to the view that in the absence of other precautions it may be negligence not to have lights on an engine using a level-crossing.<sup>6</sup>

### SECTION 3.—LOOKOUT.

**1234.** Drivers of engines must keep a good lookout, and, if danger presents itself, must pull up if they can.<sup>6</sup> When persons are expressly or impliedly allowed on a railway line elsewhere than on level-crossings, the company must take precautions for their safety.<sup>7</sup> Thus where shunting operations were in progress, there was a duty to warn off children, who in the knowledge of the company frequented the place.

<sup>1</sup> *Reilly v. Greenfield Coal and Brick Co.*, 1909 S.C. 1328.

<sup>2</sup> *Thomson v. North British Rly. Co.*, 1876, 4 R. 115.

<sup>3</sup> *Grant v. Caledonian Rly. Co.*, 1870, 9 M. 258.

<sup>4</sup> *Russell v. Caledonian Rly. Co.*, 1879, 7 R. 148.

<sup>5</sup> See *Ellis v. Great Western Rly. Co.*, 1874, L.R. 9 C.P. 551.

<sup>6</sup> *Wyllie v. Caledonian Rly. Co.*, 1871, 9 M. 463; *Archibald v. North British Rly. Co.*, 1883, 21 S.L.R. 60.

<sup>7</sup> *Smith v. Highland Rly. Co.*, 1888, 16 R. 57.

It was said further that when persons who are engaged in dangerous occupations know that those who are too young or too infirm to take care of themselves are exposed to risk therefrom, they are charged with a special duty for their protection.<sup>1</sup> Failure to keep a proper lookout is enough to render the defenders liable to a member of the public legitimately on the spot.<sup>2</sup>

1235. A railway company must provide an adequate lookout for the benefit of employees working on the line.<sup>3</sup> But there is no fault on the part of the company if the accident was due to the fault of a fellow-servant.<sup>2</sup> Failure to keep a proper lookout was found in a case where a platelayer was run down by a goods train in which, owing to the make-up of the train, neither driver nor fireman could see the four-foot way.<sup>4</sup> Similarly, fault was proved where no precautions were taken for seeing that the line was clear before an engine moving tender first was allowed to pass; here the driver's view was obstructed by coals in the tender, and a platelayer was killed.<sup>5</sup> But there is not necessarily fault in travelling with the tender of an engine in front.<sup>2</sup>

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<sup>1</sup> *Haughton v. North British Rly. Co.*, 1892, 20 R. 113; *cf.* what was said on level-crossings in *Grant v. Caledonian Rly. Co.*, 1870, 9 M. 258.

<sup>2</sup> *Ferguson v. North British Rly. Co.*, 1915 S.C. 566.

<sup>3</sup> Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 Vict. c. 27).

<sup>4</sup> *Duthie v. Caledonian Rly. Co.*, 1898, 25 R. 934.

<sup>5</sup> *Cairns v. Caledonian Rly. Co.*, 1889, 16 R. 618.

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## COLLUSION.

*See* DIVORCE.

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## COLONIAL FORCES.

*See* ARMED FORCES OF THE CROWN.

## COLONIAL SOLICITORS.

*See* LAW AGENT.

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## COLONIAL STOCK ACTS.

*See* TRUST.

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## COMBINATION.

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## COMITY.

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# COMMISSARY COURT.

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### SECTION 1.—EARLY HISTORY.

**1236.** Prior to the Reformation the Scottish bishops were in the habit of delegating much of the extensive jurisdiction which they exercised within their dioceses to certain officials, who were called the Bishop's Commissaries. After the Act passed by the Convention of Estates on August 24, 1560, which abolished the authority of the Pope and all popish jurisdictions within the realm, the functions of the Ecclesiastical Courts passed to the Court of Session, which continued for the next three years to be the tribunal for all cases formerly competent to the Ecclesiastical Courts. In 1563, however, the Commissary Courts were established, and the old ecclesiastical jurisdictions thus again restored. In addition to naming a Commissary for every diocese, Queen Mary established a new Commissary Court at Edinburgh, consisting of four judges or commissaries; and on the same day (March 5, 1563) she issued the Charter of Constitution of the Commissariat, by which the new judges were authorised to determine all causes formerly competent in the Roman Catholic Courts. Upon their re-establishment, in the reign of James VI., the bishops were given the right of naming their several commissaries. After the Revolution, however, the nomination of the commissary judges devolved on the Crown.<sup>1</sup>

### SECTION 2.—JURISDICTION.

**1237.** The principal Commissary Court—that of Edinburgh—was vested with a double jurisdiction: one diocesan or local, and the other universal or general.<sup>2</sup> Its local jurisdiction was coterminous with that of the former bishopric of Edinburgh, and comprehended the counties of Edinburgh, Haddington, Linlithgow, and Peebles, and part of Stirlingshire. Its general jurisdiction extended over the whole of Scotland, and the islands thereto belonging. In causes which were strictly of a consistorial nature, the jurisdiction of the Commissaries of Edinburgh excluded that of the Civil Courts, in the first instance, and that of the inferior commissaries. The exclusive jurisdiction extended to all actions relating to marriage or divorce, or to legitimacy or bastardy when maintained as questions of status, and also to all testamentary causes

<sup>1</sup> See Ferguson, Consistorial Law, p. 89 *et seq.*

<sup>2</sup> Bell, Prin., s. 1888.

relating to moveable succession of subjects of Scotland dying abroad or amenable to no other forum.<sup>1</sup> As the local judges in their own commissariat, they exercised a privative jurisdiction in the confirmation of testaments, in competitions for the office of executor, and in the registration of inventories and settlements; and also a concurrent jurisdiction with other Judges-Ordinary in actions of scandal, etc. An appeal lay from the decrees of the inferior Commissary Courts to the Commissary Court of Edinburgh within a year from the date of the decree.

**1238.** The inferior commissaries were originally fourteen in number, one for each of the Scottish dioceses, but their number was augmented from time to time until it eventually reached twenty-three. The jurisdiction of the inferior courts included actions of aliment and of adherence, but not cognisance in any question of marriage, and was in other respects commensurate with that exercised by the commissaries of Edinburgh as the local judges in their own commissariat. But their chief duty consisted in receiving and recording inventories and settlements, and granting confirmation in the cases of persons who died domiciled within their respective commissariats.

### SECTION 3.—MODERN LEGISLATION.

**1239.** In the year 1823<sup>2</sup> the Commissary Courts were subjected to extensive changes. All the inferior commissariats were swept away; the commissariat of Edinburgh was restricted to the three Lothians, and each of the other counties in Scotland was erected into a commissariat, with the Sheriff as commissary, and with a commissary clerk, whose office was distinct from that of the Sheriff-Clerk. The appellate jurisdiction of the Commissaries of Edinburgh was abolished, and the sole right of revision vested in the Court of Session. In 1830<sup>3</sup> the counties of Haddington and Linlithgow were detached from Edinburgh and erected into separate commissariats, on the same footing as the other counties; and in 1836<sup>4</sup> the old Commissary Court of Edinburgh itself was abolished, and its whole remaining powers and jurisdictions transferred to the Sheriff of the county of Edinburgh, as the commissary thereof. By these various statutes, and by the Court of Session Act, 1850,<sup>5</sup> the extensive jurisdiction of the Commissary Courts was practically restricted to confirmation of executors, and matters incidental thereto, namely, questions as to the formal execution of wills containing a nomination of executors, and the meaning and effect of such nominations; the appointment of executors-dative, and the amount of caution to be found by them; the appointment of factors for minor and pupil executors *quoad* executry funds, the regulation of inventories and settlements, competitions for the office of executor, etc.

**1240.** By the Sheriff Courts (Scotland) Act, 1876,<sup>6</sup> the Commissary

<sup>1</sup> Ferguson, p. 102.

<sup>2</sup> 4 Geo. IV. c. 97.

<sup>3</sup> 1 Will. IV. c. 69.

<sup>4</sup> 6 & 7 Will. IV. c. 41.

<sup>5</sup> 13 & 14 Vict. c. 36.

<sup>6</sup> 39 & 40 Vict. c. 70, s. 35.

Courts in Scotland were completely abolished, and their powers and jurisdiction transferred to the Sheriffs, then holding the office of commissaries, and to their successors in office, as Sheriffs, who should thereafter possess and exercise the whole of the said powers and jurisdictions. Power was also granted to the Court of Session to regulate the procedure and the fees of the Court, to determine the place or places at which the business transferred to the Sheriff Courts should be conducted, and to declare where the records should thereafter be kept.<sup>1</sup> Under the provisions of the Act of 1876 the office of commissary clerk, with its whole powers and duties, is already in most counties merged in that of the Sheriff-Clerk, and will ultimately be so in all except Edinburgh, where the office will continue to be maintained distinct from that of the Sheriff-Clerk, and to be regulated by the Act<sup>2</sup> of 1823. Where the office of commissary clerk continues to subsist, he is authorised to perform in the Sheriff Court of the county all the duties, and exercise all the powers, formerly competent to him in the Commissary Court; and all commissary business must be conducted through his office, and not through that of the Sheriff-Clerk. The statute, however, provides that a commissary clerk shall not, by acting as clerk in a Sheriff Court, be disabled from acting as a procurator therein, except in commissary causes.

#### SECTION 4.—PROCEDURE.

**1241.** In applications for decerniture as executor of a deceased person, it is essential that the place and date of death and the domicile of the deceased should be stated. It is further required that the petitioner shall state what relationship, character, or title he has, giving him right to apply for the appointment of executor. On the expiry of nine days after the commissary clerk has certified the intimation and publication of the petition, the petition is enrolled by the clerk and called in Court, when attendance must be given by the petitioner or his agent to move for decree. Where there is a competition, the competing applications are considered by the Sheriff, who, where the question is simply one of law, may at once conjoin the petitions, and decide the case or appoint it to be debated. Where, however, matters of fact are in dispute, the practice is to allow a record to be made up in one of the petitions, after which the case proceeds as an ordinary Sheriff Court action, the other petition being continued until the question in dispute has been decided, when both petitions are disposed of together. See CONFIRMATION OF EXECUTORS.

<sup>1</sup> See A.S., Jan. 15, 1890, and C.A.S., L. v.

<sup>2</sup> 4 Geo. IV. c. 97.

## COMMISSION.

*See* ARMED FORCES OF THE CROWN; AGENCY; CRIME; FACTORS ACT; MANDATE.

# COMMISSION AND DILIGENCE.

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## PART I.—INTRODUCTORY.

## SECTION 1.—DEFINITION.

**1242.** The grant of a commission and diligence is the method by which a Civil Court makes the whole or part of the evidence in a cause, oral or documentary, available to the Court for the decision of the cause, without requiring the actual attendance of the witnesses or havers (possessors of documents) before the judge. The Court thus delegates a part of its duty to a commissioner, who takes the depositions of the witnesses and havers, upon oath or affirmation, and reports their depositions to the Court. The commission is the judicial warrant authorising the commissioner so to act, and the diligence is likewise a judicial warrant under which the witnesses or havers are cited to appear before the commissioner, and may be compelled to attend.<sup>1</sup>

**1243.** The taking of evidence on commission in Scotland for the purposes of a criminal trial there is incompetent.<sup>2</sup> Evidence for a criminal trial in Scotland may, however, be taken on commission in the colonies and dominions,<sup>3</sup> and may also be taken in this country at the request of a foreign power for the purposes of a criminal trial in the foreign country.<sup>4</sup>

**1244.** There is no substantial difference in principle or in procedure between a commission to take evidence of witnesses and one for the recovery of documents. Their history, however, is not the same, and there are specialties in connection with the recovery of documents which

<sup>1</sup> Bell, *Dict. voce* Commission.

<sup>2</sup> Act, 1587, c. 91; *Graeme Hunter, Petr.*, 1905, 4 Adam, 523.

<sup>3</sup> Evidence by Commission Act, 1885 (48 & 49 Vict. c. 74), s. 3.

<sup>4</sup> Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 24; *Quosbarth, Petr.*, 1892, 29 S.L.R. 456.

require attention. It will therefore be convenient to treat first of commission and diligence for taking the evidence of witnesses in a cause, and then to deal with commission and diligence for the recovery of documents in the light of what has been said regarding the former type of commission.

SECTION 2.—HISTORY OF COMMISSIONS TO TAKE THE  
EVIDENCE OF WITNESSES.

SUBSECTION (1).—*Practice prior to 1815.*

1245. Prior to 1800, the practice prevailing in the Court of Session, with regard to the taking of evidence in causes depending before it, appears to have been that witnesses gave their evidence in Edinburgh before certain of the judges, deputed in rotation to take evidence,<sup>1</sup> but that witnesses who were unable, through age or infirmity, to travel to Edinburgh gave their evidence before commissioners specially appointed to receive it.<sup>2</sup> In 1800, however, the procedure was altered so that the evidence of witnesses in *all* causes might be taken upon commission,<sup>3</sup> and by 1815 this had become the universal practice.<sup>4</sup>

SUBSECTION (2).—1815 to 1866.

1246. The reintroduction of jury trial in 1815<sup>5</sup> necessarily limited the practice of taking proof on commission. Further changes were made by the Court of Session Act, 1850, under which a Lord Ordinary might, by consent of parties, try issues without a jury,<sup>6</sup> and might, without issues or jury, direct questions of fact to be tried by himself.<sup>7</sup> It was declared, however, that proof by commission in whole or part was competent, either by consent or with the leave of the Inner House, in any cause not being among those enumerated in the Court of Session Act, 1825, as appropriate for trial by jury, and, further, in any of the enumerated causes which were not actions for libel or nuisance or properly and in substance actions of damages.<sup>8</sup> The Conjugal Rights Amendment Act, 1861,<sup>9</sup> provided for proof in consistorial cases being taken by the Lord Ordinary, except as regards the evidence of persons resident beyond the jurisdiction, or unable to attend the diet of proof by reason of age, infirmity, or sickness, which might be taken on commission.

<sup>1</sup> A.S., 27th May 1532.

<sup>2</sup> Stair, iv. 41, 7.

<sup>3</sup> A.S., 11th March 1800—made perpetual by A.S., 22nd June 1809.

<sup>4</sup> Ivory's Forms of Process, vol. i. p. 229.

<sup>5</sup> Jury Trials (Scotland) Act, 1815 (55 Geo. III. c. 42); amended by 59 Geo. III. c. 35, and Court of Session Act, 1825 (6 Geo. IV. c. 120).

<sup>6</sup> Court of Session Act, 1850 (13 & 14 Vict. c. 36), s. 46.

<sup>7</sup> *Ibid.*, s. 48.

<sup>8</sup> *Ibid.*, s. 49.

<sup>9</sup> 24 & 25 Vict. c. 86, s. 13.

SUBSECTION (3).—*Present Practice.*

1247. The Evidence (Scotland) Act, 1866,<sup>1</sup> abolished the practice of taking proof on commission except in certain specified cases, and established proof at a diet before the Lord Ordinary as the normal method, apart from jury trial, of taking evidence. At the same time the statute preserved the competency of the Court or Lord Ordinary to grant commission to any competent person—

- (i) to take and report in writing the depositions of havers;
- (ii) to take the evidence in any cause in which commission to take evidence might, according to the existing law and practice, be granted;
- (iii) to take and report in writing, according to the existing practice, the evidence of any witness who is resident beyond the jurisdiction of the Court, or who by reason of age, infirmity, or sickness is unable to attend the diet of proof;
- (iv) to take the evidence of aged and infirm witnesses to lie *in retentis*, before a proof has been allowed.

## PART II.—COMMISSION AND DILIGENCE TO EXAMINE WITNESSES.

## SECTION 1.—COMMISSION TO TAKE THE WHOLE EVIDENCE.

1248. Para. (ii) above is understood to refer to the practice of taking the whole evidence in a cause upon commission, as it existed prior to 1866, *i.e.* in all cases other than those appropriated to jury trial, and also in those jury causes which were not actions for libel or nuisance or properly and in substance actions of damages,<sup>2</sup> and in consistorial causes.<sup>3</sup> Several cases of reduction prior to 1866 are examples of the type of case in which it would still be competent to grant proof by commission.<sup>4</sup> Even in these, however, it was necessary to shew cause, and it has been doubted whether in two of these cases sufficient cause was shewn.<sup>5</sup> The circumstance that most or almost all of the witnesses are resident at a distance, or that all the witnesses on one side are so, would be an element in favour of granting proof by commission, and it would be easier to obtain the commission if the cause were not one appropriated to jury trial.<sup>6</sup> Where in a case after 1866 proof by commission was asked on the ground that expense would be saved and the sum at stake was small,

<sup>1</sup> 29 & 30 Vict. c. 112, ss. 1, 2.

<sup>2</sup> 13 & 14 Vict. c. 36, s. 49; *Nicol v. Britten & Owden*, 1872, 10 M. 351.

<sup>3</sup> 24 & 25 Vict. c. 86, s. 13.

<sup>4</sup> *Fairholme v. Fairholme's Trs.*, 1856, 19 D. 178; *Watt v. Watt*, 1857, 19 D. 787; *Craig v. Jack*, 1857, 19 D. 862.

<sup>5</sup> Mackay, Manual, pp. 370–1.

<sup>6</sup> Lord Pres. M'Neill in *Watt v. Watt*, *supra*, at p. 789.

the motion was refused.<sup>1</sup> There has been no reported case since 1866 of commission being granted to take the whole evidence, apart from questions of age, infirmity, etc.<sup>2</sup>

## SECTION 2.—COMMISSION TO TAKE EVIDENCE TO LIE

### IN RETENTIS.

#### SUBSECTION (1).—*General.*

**1249.** It is frequently necessary, and it is in accordance with the practice which was in existence long before 1866,<sup>3</sup> to have the evidence of particular witnesses taken on commission when otherwise it would, or might, be lost or not be available to the Court. Where from any cause, such as extreme age, precarious health,<sup>4</sup> or imminent departure from this country,<sup>5</sup> there is risk that a witness may not be able to attend the trial, his evidence may be taken at once and laid aside until the proper time arrives for adducing it. It is then said to be *in retentis*.

#### SUBSECTION (2).—*Grounds of Application.*

##### (i) *Old Age.*

**1250.** When a commission is desired on account of old age alone, it has been and is the practice to grant it where the witness is seventy years of age and upwards.<sup>6</sup> The fact of age may be proved before the commissioner.<sup>7</sup> The depositions of witnesses under seventy will only be permitted to be taken on commission on special cause shewn,<sup>8</sup> e.g. *penuria testium*,<sup>9</sup> and the Court has refused commission to examine even very old witnesses when the evidence of other and equally good witnesses was available.<sup>10</sup>

##### (ii) *Sickness or Infirmity.*

**1251.** In the case of sickness or infirmity of a witness, apart from old age, it is the practice of the Court to insist upon production of a medical

<sup>1</sup> *Mackenzie v. British Linen Co.*, 1879, 17 S.L.R. 241; see also *Macdonald v. Macdonald*, 1923 S.L.T. 694.

<sup>2</sup> *A. B. v. C. B.*, 1911, 1 S.L.T. 264.

<sup>3</sup> *Boettcher v. Carron Co.*, 1861, 23 D. 322, per Lord Cowan at p. 325.

<sup>4</sup> Evidence (Scotland) Act, 1866, *supra*, s. 2.

<sup>5</sup> *Hansen v. Donaldson*, 1873, 1 R. 237; *Pringle, Petr.*, 1905, 7 F. 525; *Neill, Petr.*, 1911, 48 S.L.R. 830; *Anderson, Petr.*, 1912 S.C. 1144.

<sup>6</sup> A.S., 11th July 1828, s. 117; *Forbes v. Smyth*, 11th March 1820, F.C.; *Harvey's Trs. v. Leslie*, 1827, 5 S. 896 (N.E. 832); *Morison v. Cowan*, 1828, 6 S. 1082; *Watsons, Petrs.*, 1829, 8 S. 261; *Hunt v. Comrs. of Woods and Forests*, 1856, 18 D. 317; *Wilson v. Young*, 1896, 4 S.L.T. 73.

<sup>7</sup> *Morison v. Cowan*, *supra*; *Watsons, Petrs.*, *supra*.

<sup>8</sup> *Ross v. Forbes*, 1856, 18 D. 986; *Hay v. Binny*, 1859, 22 D. 183.

<sup>9</sup> *Earl of Fife v. Earl of Fife's Trs.*, 11th March 1815, F.C.; *Copland v. Bethune*, 1827, 5 S. 272.

<sup>10</sup> *Dudgeon v. Forbes*, 1832, 10 S. 810; Mackay, Manual, p. 266.



certificate on soul and conscience before granting the commission.<sup>1</sup> A commission has frequently been granted where the witness was so ill as to render it unlikely that she could attend the trial.<sup>2</sup>

(iii) *Witness going Abroad.*

**1252.** The case of a witness intending to go abroad is not specifically mentioned in the last proviso of s. 2 of the Evidence (Scotland) Act, 1866,<sup>3</sup> but it has always been the practice in such a case to grant commission to take the evidence to lie *in retentis*. This mode of examination has been allowed in the case of persons employed on shipboard,<sup>4</sup> either in the Royal Navy<sup>5</sup> or in the Mercantile Marine.<sup>6</sup> Soldiers about to go on foreign service<sup>7</sup> and persons about to emigrate<sup>8</sup> have been similarly dealt with. In cases occurring before 1866, the fact that the witness was in the service of the applicant for the commission was considered by the Court, with different results in each case.<sup>9</sup>

(iv) *Witness Abroad.*

**1253.** The last proviso of s. 2 of the Evidence (Scotland) Act, 1866, does not refer in terms to the case of witnesses who are actually abroad. The Court appear to have exercised from very early times the power to grant commission before proof has been ordered, to take the evidence to lie *in retentis*, of witnesses abroad.<sup>10</sup> Such commissions have been granted in exceptional circumstances.<sup>11</sup>

SUBSECTION (3).—*Parties to the Cause.*

**1254.** The evidence of any of the parties to a cause may competently be taken on commission to lie *in retentis*. Whether commission will be granted<sup>12</sup> or not<sup>13</sup> will depend entirely on the circumstances of the case, including the kind of circumstances above mentioned, *e.g.* age. In consistorial cases the oath of calumny is included in the evidence

<sup>1</sup> *Nairn v. Smith*, 1833, 11 S. 465.

<sup>2</sup> *Gordon v. Orrok*, 1849, 11 D. 1358.

<sup>3</sup> *Supra*, para. 1247.

<sup>4</sup> A.S., 11th July 1828, s. 117.

<sup>5</sup> *Pringle, Petr.*, 1905, 7 F. 525; *Clouston v. Morris*, 1848, 20 Sc. Jur. 228.

<sup>6</sup> *Sutter v. Aberdeen Arctic Co.*, 1858, 30 Sc. Jur. 300; *Scott, Petr.*, 1866, 4 M. 1103; *Hansen, supra*; *Neill, supra*.

<sup>7</sup> *A. v. B.*, 1831, 4 Deas and And. 252.

<sup>8</sup> *Munro v. Mackenzie & Fraser*, 23rd June 1831, F.C.; cf. *Ferrier v. Berry*, 1822, 1 S. 598.

<sup>9</sup> *Sutter, supra*; *Munn v. Macgregor*, 1854, 16 D. 385.

<sup>10</sup> *Boeticher, supra*.

<sup>11</sup> *Malcolm v. Stewart*, 1829, 7 S. 715; *Ross v. Forbes*, 1856, 18 D. 986; cf. *Hay v. Binny, supra*.

<sup>12</sup> Granted in *Donnar v. Paterson*, 1859, 21 D. 1301; *Laing v. Nixon*, 1866, 4 M. 327; *Sheard v. Haldane*, 1867, 5 M. 636 (under reservation of the competency); *Hansen v. Donaldson*, 1873, 1 R. 237; *Samson & Co. v. Hough*, 1886, 13 R. 1154; *Robertson v. Robertson*, 1897, 4 S.L.T. 358; *Pringle, Petr.*, 1905, 7 F. 525; *Anderson v. Morrison*, 1905, 7 F. 561.

<sup>13</sup> Refused in *Sofio v. Gillespie & Cathcart*, 1867, 39 Sc. Jur. 268.

which may be taken on commission. A commission has been granted where the pursuer was abroad,<sup>1</sup> in ill-health,<sup>2</sup> or about to set out on a voyage.<sup>3</sup> In one case, on the application of a pursuer, commission was granted to examine an aged defender, on the pursuer waiving his right to refer to the defender's oath.<sup>4</sup> A commissioner who was appointed to take the evidence of a defender and a co-defender in an action of divorce for adultery was directed, in the interlocutor appointing him, to inform himself that these parties understood the line of examination proposed, and were aware of the statutory protection, and were willing, notwithstanding, to be examined.<sup>5</sup>

#### SUBSECTION (4).—*Consent of Parties—Penuria testium.*

**1255.** Other elements which in practice weigh with the Court in granting or refusing such commissions are the consent of parties and *penuria testium*, neither of which, however, is mentioned in the last proviso of s. 2 of the Evidence (Scotland) Act, 1866.<sup>6</sup> Consent of parties was found in one case to obviate the necessity of the Court inquiring into the competency of an application before the record was closed to examine certain witnesses on the Continent, there being no suggestion of danger to life, and commission was granted.<sup>7</sup> Where one or two witnesses alone know the facts of a case there is said to be *penuria testium*, and this will be a ground for granting commission to take their evidence to lie *in retentis*, even where there is no immediate danger of their evidence being lost. Thus in a case where a deed was alleged to have been impetrated,<sup>8</sup> and in another where there was a question whether the deed had been read over and explained to the granter,<sup>9</sup> the instrumentary witnesses were allowed to be examined on commission *in initio litis*. A *prima facie* case of *penuria testium* must, however, be made out, otherwise the commission will be refused,<sup>10</sup> except where the application is of consent.<sup>7</sup>

#### SUBSECTION (5).—*Time and Method of Application.*

**1256.** Applications for commission to take evidence to lie *in retentis* may be made, if the action has been called, by motion to the Lord Ordinary before whom it depends,<sup>11</sup> or to the Inner House if the cause is depending there. Before that stage—*i.e.* before the action has been

<sup>1</sup> *A. B. v. C. D.*, 1838, 16 S. 1143.

<sup>2</sup> *Orde v. Murray*, 1846, 8 D. 535.

<sup>3</sup> *Scott, Petr.*, 1866, 4 M. 1103; *Pringle, Neill, Anderson, supra*.

<sup>4</sup> *Laing v. Nixon*, 1866, 4 M. 327.

<sup>5</sup> *Roger v. Roger*, 1898, 6 S.L.T. 233.

<sup>6</sup> *Supra*, para. 1247.

<sup>7</sup> *Malcolm v. Stewart*, 1829, 7 S. 715.

<sup>8</sup> *Earl of Lauderdale v. Duchess of Lauderdale*, 1696, Mor. 12095; *Gloag v. Wilson*, 1840, 12 Sc. Jur. 667.

<sup>9</sup> *Copland v. Bethune*, 1827, 5 S. 272 (N.E. 253); *Earl of Fife v. Earl of Fife's Trs.*, 11th March 1815, F.C.

<sup>10</sup> *Maltman's Factor v. Cook*, 1867, 5 M. 1076.

<sup>11</sup> *Hunt v. Comrs. of Woods and Forests*, 1856, 18 D. 317; Mackay, Manual, p. 367.

raised,<sup>1</sup> or when a summons has been signeted but before service has been made,<sup>2</sup> or after execution but before calling<sup>2</sup>—the application is made to the Inner House, by motion where the summons or petition has been executed,<sup>3</sup> and by petition where the summons or petition has not been executed.<sup>4</sup> In vacation or recess the application is made to the Lord Ordinary on the Bills, but the applicant must state, and if required shew, that he was unavoidably prevented from making it in session.<sup>5</sup> Motion to the Lord Ordinary may be made after a reclaiming Note which does not remove the cause to the Inner House,<sup>6</sup> and to the Inner House after an appeal to the House of Lords.<sup>7</sup>

**1257.** Forty-eight hours' notice of motion must be given to the opposite agent, save in cases of great urgency,<sup>8</sup> and the names of the witnesses to be examined should be intimated. Commission has been granted to examine witnesses named, "and such other witnesses as shall be proved to the commissioner to be in a bad or dangerous state of health, or to be above seventy years of age."<sup>9</sup> An interlocutor in similar terms has been pronounced, on condition that a list of witnesses should be furnished to the opposite party a certain number of days before the date proposed for their examination.<sup>10</sup> It is not now the practice to require a condescendence of the facts upon which the witnesses are to be examined before proof has been allowed,<sup>11</sup> and interrogatories are not required.<sup>12</sup>

#### SUBSECTION (6).—*Use of Deposition at Trial.*

**1258.** Where a deposition of a witness has been taken to lie *in retentis* and the witness has died before the proof or trial, the deposition may be used as evidence. So also where the witness is still abroad or still infirm.<sup>13</sup> Re-examination of a witness whose deposition has been taken, but who is alive and in this country at the date of the proof or trial, may be demanded, but in practice this is not insisted upon.<sup>14</sup> The depositions cannot be used at all if the witnesses are brought forward.<sup>15</sup>

<sup>1</sup> *Johnstone v. Keyden*, 1824, 3 S. 238 (N.E. 167); *Bryden v. Scott*, 1825, 4 S. 87 (N.E. 90).

<sup>2</sup> *Smiths, Petrs.*, 21st January 1802, F.C.; *Blair v. Mags. of Brechin*, 1825, 4 S. 98 (N.E. 100); *Clouston v. Morris*, 1848, 20 Sc. Jur. 228; *Scott, Sheard, Hansen, Pringle, Neill, supra*.

<sup>3</sup> Mackay, Manual, p. 367; Dickson, Evidence, ss. 1732, 1734; *Hansen, supra*.

<sup>4</sup> *Anderson, Petr.*, 1912 S.C. 1144.

<sup>5</sup> A.S., 11th July 1828, s. 117.

<sup>6</sup> *Riddell v. Riddell*, 1890, 18 R. 1.

<sup>7</sup> Mackay, Manual, p. 367.

<sup>8</sup> *A. v. B.*, 1831, 4 Deas & And. 252; *Earl of Winton v. Kingston*, 1710, Mor. 12096.

<sup>9</sup> *Watsons, Petrs.*, 1829, 8 S. 261; *Morison v. Cowan*, 1828, 6 S. 1082; *Hunt, supra*.

<sup>10</sup> *Oswald v. Lawrie*, 1824, 3 S. 381; *Gardner v. Mags. of Kilrenny*, 1825, 3 S. 613; *Ramsay v. Cochrane*, 1825, 3 S. 643; see also *Mags. of Glasgow v. Dawson & Mitchell*, 1827, 5 S. 915.

<sup>11</sup> *Watsons, supra*; *Cameron, Petr.*, 1830, 8 S. 435.

<sup>12</sup> *Wemyss v. Lord Advocate*, 1894, 1 S.L.T. 561.

<sup>13</sup> *Boeltcher v. Carron Co.*, 1861, 23 D. 322, per Lord Cowan at pp. 325–6.

<sup>14</sup> *Ibid.*, per Lord Justice-Clerk Inglis at p. 327; cf. *Watson v. Glass*, 1837, 15 S. 753.

<sup>15</sup> A.S., 16th February 1841, s. 17; *Forrests v. Low's Trs.*, 1907 S.C. 1240.

SECTION 3.—PARTICULAR WITNESSES AFTER ISSUES ADJUSTED OR  
DIET OF PROOF FIXED.SUBSECTION (1).—*General.*

1259. After issues have been adjusted or proof allowed, the granting of commissions is regulated by the Act of Sederunt of 1841,<sup>1</sup> which applies not only to jury trials but also to proofs before a judge.<sup>2</sup> The Act of Sederunt has not been included in the Codifying Act, 1913, but may be taken, subject to some modification, as an authoritative declaration of the present law and practice, particularly as regards the requirements to be satisfied before the Court or Lord Ordinary will grant commission, after proof has been allowed or issues adjusted. Oath as to the special circumstances of a witness is not now required in practice, except in the case of a witness suffering from sickness or infirmity, and interrogatories are now frequently dispensed with.

1260. “When it shall be made out upon oath, to the satisfaction of the Court,<sup>3</sup> that a witness resides beyond the reach of the process of the Court, and is not likely to come within its authority before the day of trial, or cannot attend on account of age or permanent infirmity, or is labouring under severe illness, which renders it doubtful whether his evidence may not be lost, or is a seafaring man, or is obliged to go into foreign parts, or shall be abroad and not likely to return before the day of trial, it shall be competent to examine such witness by commission, on interrogatories to be settled by the parties, and approved of by one of the Principal Clerks of Session, or Record Clerk; and it being established at the trial to the satisfaction of the Court, by affidavit, or by oath in open Court, that such witness is dead, or cannot attend owing to absence, age, or permanent infirmity, it shall be competent to use at the trial the evidence so taken, subject to all legal objections to its admissibility; and in all cases when a commission is granted, upon the application of one party, for examining witnesses as aforesaid, it shall be competent to the other party to have a joint commission, or to propose cross interrogatories to such witnesses, to be settled as aforesaid; and in addition to the interrogatories so settled, it shall be competent to the commissioner to put such additional questions to the witnesses as may appear to him to be necessary, taking care to mark the question so put as put by him; that when one party obtains a commission to examine witnesses, and does not use the evidence obtained under the commission, the other party may use the evidence given under it at the trial, provided he satisfies the Court at the trial that he could not bring the witness or witnesses whose evidence he proposes to read, in which case he shall be liable for the expenses of the commission. The deposi-

<sup>1</sup> A.S., 16th February 1841, s. 17, *cit. infra*.

<sup>2</sup> *M'Lean & Hope v. Fleming*, 1867, 5 M. 579.

<sup>3</sup> See *Willow v. Farrell*, 1848, 10 D. 807.



tions taken on commission shall not be used if the witnesses so examined shall afterwards be brought forward at the trial."

SUBSECTION (2).—*Time of Application.*

**1261.** Application for the commission may be made as soon as proof is allowed or issues adjusted. It has been held competent to apply during the course of a trial, where a witness became ill after being cited.<sup>1</sup> If, however, the party citing a material witness is aware before the jury is empanelled and sworn that he cannot attend on account of illness, motion should be made to postpone the trial,<sup>2</sup> especially if the cause of absence is only temporary.<sup>3</sup> Where, after successive postponements over about a year, the witness's health did not seem to improve, commission was ultimately granted to take his evidence.<sup>4</sup> Motion by a defender, at the close of a proof, for commission to examine a witness has been granted, on condition that the defender paid all expenses caused thereby.<sup>5</sup>

SUBSECTION (3).—*To Whom made.*

**1262.** In session the application is made to the Lord Ordinary or Division before whom the cause depends. In vacation it is made to the judge who is to preside at the trial or proof, and in his absence to the Lord Ordinary on the Bills, it being shewn to the satisfaction of the judge before whom the motion is made that it could not have been made during session.<sup>6</sup>

SUBSECTION (4).—*Grounds for Application.*

**1263.** The grounds upon which the Court grants such commissions are those stated in the Act of Sederunt, and also those already mentioned in connection with applications for commissions made prior to proof being allowed or issues adjusted, and similar considerations and conditions will apply. When the ground is age alone, the witness must be seventy years of age or upwards.<sup>7</sup> When the ground is sickness or infirmity, a medical certificate on soul and conscience must be produced. In one case where the fact of sickness was disputed the Lord Ordinary granted commission, but appointed a neutral medical man to examine the witnesses and report whether they were fit to attend the trial.<sup>8</sup>

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<sup>1</sup> *Stone v. Aberdeen Marine Insurance Co.*, 1849, 11 D. 1041; *Lord Forbes v. Leys, Masson & Co.*, 1830, 5 Murray, 289, per Lord Gillies.

<sup>2</sup> A.S., 16th February 1841, s. 25.

<sup>3</sup> *Gordon v. Orrok*, 1849, 11 D. 1358.

<sup>4</sup> *Anderson v. Morrison*, 1905, 7 F. 561.

<sup>5</sup> *Cecil v. Marchioness of Huntly*, 1905, 13 S.L.T. 189.

<sup>6</sup> A.S., 16th February 1841, s. 21.

<sup>7</sup> *Wilson v. Young*, 1896, 4 S.L.T. 73.

<sup>8</sup> *Lunn v. Watt*, 1911, 2 S.L.T. 479.

SUBSECTION (5).—*Insane Witnesses.*

**1264.** Commission has been granted for the examination of insane witnesses, and witnesses of doubtful mental capacity, and a commissioner has been directed to satisfy himself that the witness understood and was fit to answer questions. It is, however, part of the commissioner's duties to satisfy himself as a judge would at a jury trial.<sup>1</sup> Commission has also been granted under reservation as to the effect of the evidence, and the evidence subsequently discarded.<sup>2</sup> A pauper lunatic has been allowed to be examined on commission provided the commissioner was satisfied that the witness's health would not be injuriously affected.<sup>3</sup>

SUBSECTION (6).—*Witnesses Resident in England or Northern Ireland.*

**1265.** Witnesses resident in England or Northern<sup>4</sup> Ireland may now be cited on warrant from the Court of Session to appear at proofs or trials in the Court of Session.<sup>5</sup> Where, therefore, the sole ground of application is the fact of residence in England or Northern Ireland, commission will not be granted.<sup>6</sup> In exceptional cases, even apart from age, sickness, or infirmity, the Court may grant commission, *e.g.* in the case of a London medical man, where the loss and inconvenience to himself, and the danger of his absence to his numerous patients, were held to outweigh the desirability of his attendance in person.<sup>7</sup> Where commission is granted to examine a witness in England or Northern Ireland, the witness is served with a notice of the diet, signed by the commissioner, failure to appear is certified by the commissioner, and any of the Superior Courts of England or Northern Ireland may, upon application being made to them, order the witness to attend. Failure to obtemper such order renders the witness, if offered conduct money and expenses, and not required to attend on more than two consecutive days,<sup>8</sup> liable to the penalties attaching to disobedience to a writ of *subpoena*. This

<sup>1</sup> *Riddell v. Riddell*, 1890, 18 R. 1; cf. *Riley v. M'Laren*, 1853, 16 D. 323; *M'Intyre v. M'Intyre*, 1920, 1 S.L.T. 207.

<sup>2</sup> *Tosh v. Ogilvy*, 1873, 1 R. 254.

<sup>3</sup> *Kilpatrick Parish Council v. Row Parish Council*, 1911, 2 S.L.T. 32.

<sup>4</sup> Government of Ireland Act, 1920 (10 & 11 Geo. V. c. 67), s. 69 (a); General Adaptation of Enactments (Northern Ireland) Order, 1921 (S.R. & O., 1921, No. 1804), s. 5; Irish Free State (Consequential Provisions) Act, 1922 (13 Geo. V. c. 2), s. 6 (1) (a); the Irish Free State (Consequential Adaptation of Enactments) Order, 1923 (S.R. & O., 1923, No. 405), s. 3.

<sup>5</sup> Attendance of Witnesses Act, 1854 (17 & 18 Vict. c. 34), s. 5; *Henderson v. North British Rly. Co.*, 1870, 8 M. 833; *Duke of Athole v. Robertson*, 1878, 5 R. 845; *Macdonald v. Highland Rly. Co.*, 1892, 20 R. 217.

<sup>6</sup> For prior practice see *Gray v. Sutherland*, 1849, 11 D. 1489; *Mackintosh v. Fraser*, 1859, 21 D. 783.

<sup>7</sup> *Henderson v. North British Rly. Co.*, *supra*.

<sup>8</sup> Evidence by Commission Act, 1843 (6 & 7 Vict. c. 82), ss. 5, 6, and 7; Evidence by Commission Act, 1859 (22 Vict. c. 20); *Campbell v. Earl of Breadalbane and Ors.*, 1867, 5 M. 850; *affd.* (H.L.) 1869, 41 Sc. Jur. 584.

procedure may be made applicable to commissions granted by an arbiter, by means of a petition to the Inner House, which may interpose its authority to the arbiter's appointment.<sup>1</sup>

SUBSECTION (7).—*Witnesses Resident in Dominions and Colonies.*

**1266.** Witnesses resident furth of the United Kingdom but within His Majesty's Dominions (including now the Irish Free State<sup>2</sup>), on the other hand, cannot be compelled to attend a proof or trial in Scotland, and commissions to examine persons so resident are frequently granted.<sup>3</sup> The aid of Superior Courts of the dominion where the commission is to be executed may be invoked for compelling the attendance of the witness in that dominion before the commissioner appointed by the Court of Session,<sup>4</sup> or the Court of Session may grant commission, addressed to any Court or any judge of a Court, in India, or the Colonies, or elsewhere in His Majesty's dominions, upon receiving which the Court or judge addressed may nominate some fit person to take the examination, and the provisions for compulsion will similarly apply.<sup>5</sup>

SUBSECTION (8).—*Witnesses Resident in Foreign Countries.*

**1267.** Witnesses resident in a foreign country, *i.e.* neither in the United Kingdom nor in any of His Majesty's dominions or colonies, cannot be compelled to attend, and it has long been the practice to grant commissions to take such a person's evidence in the foreign country where he resides.<sup>6</sup> The matter, however, is in the discretion of the Court, and commission has been refused, for example, when the person to be examined was a party to the cause<sup>7</sup> or his evidence was very important.<sup>8</sup> To obviate difficulties which had been met with in obtaining the evidence on commission of witnesses resident in foreign countries, the Act of Sederunt, 15th March 1890,<sup>9</sup> was passed, providing for application by minute in schedule form in the Court of Session for a letter of request to the foreign tribunal within whose jurisdiction the witness resides.<sup>10</sup> The Division or Lord Ordinary may grant such a letter to be signed by the President of the Division or the Lord Ordinary in schedule form.<sup>11</sup> It

<sup>1</sup> *Blaikie v. Aberdeen Rly. Co.*, 1851, 13 D. 1307; *Highland Rly. Co. v. Mitchell*, 1868, 6 M. 896; *Nimmo & Son, Ltd., Petrs.*, 8 F. 173.

<sup>2</sup> Irish Free State (Consequential Provisions) Act, 1922 (13 Geo. V. c. 2), s. 6, and S.R. & O., 1923, No. 405, p. 400, ss. 2, 3.

<sup>3</sup> *Napier v. Leith*, 1859, 21 D. 1154.

<sup>4</sup> Evidence by Commission Act, 1859 (22 Vict. c. 20).

<sup>5</sup> Evidence by Commission Act, 1885 (48 & 49 Vict. c. 74).

<sup>6</sup> A.S., 11th March 1800, s. 6; *Duguids v. Duguid*, 1826, 4 S. 613 (N.E. 620); *Bond v. MacLeod*, 1841, 4 D. 35; *M'Culloch v. Babington*, 1851, 14 D. 172; *H.M. Advocate v. Fleming*, 1864, 2 M. 1032.

<sup>7</sup> *Watt v. Watt*, 1857, 19 D. 787.

<sup>8</sup> *Western Ranches, Ltd. v. Nelson's Trs.*, 1898, 25 R. 527; cf. *Grant v. Countess of Seafield*, 1926 S.C. 274 (refused); 1926 S.L.T. 213 (granted).

<sup>9</sup> C.A.S., B, ii. 3.

<sup>10</sup> *Ibid.*, s. 1; Schedule A.

<sup>11</sup> *Ibid.*, s. 2; Schedule B.

must be prepared by the applicant and lodged in process with the minute;<sup>1</sup> and the applicant's agent must become personally bound for the whole expenses payable both to the foreign Court and to the witness, and consign such sum for that purpose as the Division or Lord Ordinary may determine.<sup>2</sup> The applicant must also lodge a translation of the letter of request and relative interrogatories into the language of the foreign Court.<sup>3</sup> The letter, interrogatories, and translations are then transmitted by the clerk of the process to the Foreign Office with a request that the evidence when received shall be forwarded under seal to him to abide the orders of the Court.<sup>4</sup> A letter of request may also be obtained in the Sheriff Court on application to the Sheriff under the Act of Sederunt, 2nd February 1893.<sup>5</sup> When this procedure is not taken advantage of, and a commissioner is appointed by the Court of Session to take evidence in a foreign country, he is deemed to hold a Scottish Court; the proceedings are in English, and he must make use of a sworn interpreter when any witness does not understand English.<sup>6</sup>

#### SECTION 4.—COMMISSIONS FROM COURTS OUTWITH THE JURISDICTION TO BE EXECUTED IN SCOTLAND.

**1268.** Commissions granted by the Courts of England or Northern Ireland will normally be executed in Scotland, in ordinary course, in a similar manner to Scottish commissions. Where, however, a witness resident in Scotland refuses or fails to attend in Scotland, recourse may be had to the procedure laid down by the Evidence by Commission Act, 1843,<sup>7</sup> which applies to all three countries. Applications may be made to the Court of Session for an order upon the witness to attend, and if he fail to do so, letters of second diligence may be used against him, under the conditions in the Act.<sup>7</sup> The procedure under the Act is by petition to the Inner House.<sup>8</sup>

**1269.** The procedure under the Evidence on Commission Act, 1859,<sup>9</sup> which is appropriate to cases where a Colonial Court has authorised by commission, order, or other process the obtaining of the evidence of a person resident in Scotland for the purpose of a suit before it, may also be resorted to by the English or Northern Irish Courts. The Court of Session will, upon application by petition to the Inner House, compel the attendance of the witness before the commissioner appointed by the Colonial, English, or Northern Irish Court, under the conditions as to expenses laid down in that Act.<sup>10</sup> In a petition following upon a letter of request from an Indian tribunal, the petitioner asked that the

<sup>1</sup> C.A.S., B, ii. s. 2.

<sup>2</sup> *Ibid.*, s. 3.

<sup>3</sup> *Ibid.*, s. 4.

<sup>4</sup> *Ibid.*, s. 5.

<sup>5</sup> C.A.S., L, ii.

<sup>6</sup> *Blasquez v. Levy & Sons*, 1893, 1 S.L.T. 271.

<sup>7</sup> 6 & 7 Vict. c. 82, ss. 5, 6, and 7; with reference to Northern Ireland and the Irish Free State see Notes to paras. 1265 and 1266, *supra*.

<sup>8</sup> *Campbell v. Earl of Breadalbane*, 1867, 5 M. 850.

<sup>9</sup> 22 Vict. c. 20; as to position of Northern Ireland and Irish Free State see Notes to paras. 1265 and 1266, *supra*.

<sup>10</sup> *Ibid.*, s. 3.



examination should take place before the Sheriff or Sheriff-Substitute of the county in which the witness resided. The Court, however, appointed a member of the Bar as commissioner, reserving the question whether, if the letters of request had appointed the Sheriff or Sheriff-Substitute, the Court would have felt bound to grant the request in terms.<sup>1</sup>

1270. Where a competent foreign tribunal, in which any civil or commercial matter is depending, is desirous of obtaining the evidence of witnesses resident in Scotland, the Court of Session may order their examination before any person named in such order.<sup>2</sup> Application is made by petition to the Inner House.<sup>3</sup> A certificate under the hand of the ambassador, minister, or other diplomatic agent, or consul in London, of the foreign power, received and admitted as such by His Majesty, is sufficient evidence that the deposition is required.<sup>3</sup> Other evidence, however, is admissible.<sup>4</sup> The Court has appointed a Sheriff-Substitute instead of the petitioner, as suggested,<sup>5</sup> the petitioner himself (a merchant),<sup>6</sup> and the legal assessor of a local consul.<sup>3</sup> The Court, however, in the case last cited made it clear that, while it adopted the petitioner's suggestion, the appointment was in the Court's hands, and in a subsequent case declined to appoint the petitioner, a vice-consul, and appointed a Sheriff-Substitute.<sup>7</sup> In one case the Court decided that such depositions are not intended to be taken before a Court of law, but only before a commissioner. The letter of request from the foreign Court contemplated an examination of the witness before the Sheriff-Substitute as a Court, under a misapprehension as to the provisions of the Act. The Court appointed a member of the Bar as commissioner.<sup>8</sup> Where, however, the application was at the instance of the Lord Advocate, the Court, as an act of comity and to save trouble and expense to a foreign Government, appointed a Sheriff-Substitute, but expressly as a commissioner.<sup>9</sup> Where the request and petition did not specify the names of any witnesses<sup>10</sup> but craved the Court to order the examination of representatives of a limited company and to ordain the company to appoint such representatives, the Court, in respect that the foreign tribunal had no means of naming these representatives, granted the prayer.<sup>11</sup> Any commissioner under the Act may examine the witnesses under oath or affirmation, and witnesses may be found guilty of perjury.<sup>12</sup> Witnesses are entitled to conduct-money and payment for expenses and loss of time as in a trial,<sup>13</sup> and have the same rights as to refusal to answer questions or to produce documents as in any cause pending in the Court

<sup>1</sup> *M'Corquodale, Petr.*, 1923 S.C. 792, per Lord Pres. Clyde at p. 794; see s. 1.

<sup>2</sup> Foreign Tribunals Evidence Act, 1856 (19 & 20 Vict. c. 113), ss. 1, 6.

<sup>3</sup> *Stemrich, Petr.*, 1886, 13 R. 1156.

<sup>4</sup> *Ibid.*, s. 2.

<sup>5</sup> *Blair, Petr.*, 1883, 10 R. 1223.

<sup>6</sup> *Robinow, Petr.*, 1883, 10 R. 1246.

<sup>7</sup> *Reid, Petr.*, 1890, 17 R. 790.

<sup>8</sup> *Baron de Bildt, Petr.*, 1905, 7 F. 899; see also *M'Corquodale, supra*.

<sup>9</sup> *Lord Advocate, Petr.*, 1909 S.C. 199; and see 1925 S.C. 568.

<sup>10</sup> 19 & 20 Vict. c. 113, s. 1.

<sup>11</sup> *Lord Advocate, Petr.*, 1925 S.C. 568.

<sup>12</sup> Sec. 3.

<sup>13</sup> Sec. 4.

of Session.<sup>1</sup> The testimony of a witness in relation to any criminal matter may be obtained in like manner.<sup>2</sup>

SECTION 5.—COMMISSIONS UNDER THE COMPANIES (CONSOLIDATION) ACT, 1908, AND UNDER PEACE TREATY ORDERS.

SUBSECTION (1).—*Under Companies Act.*

1271. Where a company is being wound up in any part of the United Kingdom (now excluding the Irish Free State<sup>3</sup>), the Court may refer the whole or any part of the examination of any witnesses under the Act to a commissioner, although out of the jurisdiction of the Court which made the winding-up order, and in Scotland such commissioners are the Sheriffs of counties. In addition to any powers he may have as Sheriff, the commissioner has, in the matter so referred to him, the same powers of summoning and examining witnesses, of requiring the production or delivery of documents, of punishing defaults by witnesses, and of allowing costs and expenses to witnesses, as the Court which made the winding-up order.<sup>4</sup>

1272. Any person for the time being in Scotland, whether a contributory of the company or not, may be examined in regard to the trade, dealings, affairs, or property of the company, and if a contributory, so far as the company may be interested therein by reason of his being a contributory. The order or commission is directed to the Sheriff of the county in which the witness is residing or happens to be for the time, and the Sheriff summons him to appear for examination on oath as a witness or haver and to produce documents. The examination is either oral or on written interrogatories, and is reported in the usual form to the Court, with documents produced. Appearance, giving of evidence, and production of documents may be enforced under the law of Scotland. The Sheriff is entitled to the like fees, and the witness to the like allowances, as in commissions from the Court of Session. The Sheriff may report to the Court any objection by the witness, and suspend the examination until the objection is disposed of by the Court.<sup>5</sup>

SUBSECTION (2).—*Under Peace Treaty Orders.*

1273. In pursuance of various Orders in Council under the Peace Treaties, the Administrator of enemy property may apply by petition to the Lord Ordinary on the Bills, for the examination of any person known or suspected to have in his possession or under his control any enemy property, or of any person whom the Court may consider capable of giving information with respect to any such property. The examina-

<sup>1</sup> Secs. 5 and 6.

<sup>2</sup> Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 24.

<sup>3</sup> See Note to paras. 1265 and 1266, *supra*.

<sup>4</sup> Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), s. 226.

<sup>5</sup> *Ibid.*, s. 227.

tion may be at a diet before the Lord Ordinary on the Bills, or before a commissioner appointed by him.<sup>1</sup>

#### SECTION 6.—PROCEDURE.

##### SUBSECTION (1).—*Application for Commission.*

**1274.** Application for a commission is made by note in the Single Bills of the Division in which the cause is depending, or if in the Outer House, by motion to the Lord Ordinary. Forty-eight hours' notice of the application is required<sup>2</sup>—in jury cases thirty-six<sup>3</sup>—but in urgent cases this rule may be relaxed or dispensed with.<sup>4</sup> In applications made in session it is unnecessary to give in a condescendence of the facts which the witness is to be called to prove.<sup>5</sup> Apparently such a condescendence is still necessary in vacation or recess.<sup>6</sup> The names of the witnesses to be examined must be given.<sup>7</sup> Where, however, the power of determining, with reference to health and age, what witnesses ought to be examined has been delegated to the commissioner,<sup>8</sup> a list of the witnesses whom it is proposed to examine should be given to the opposite party several days before the diet.<sup>9</sup>

##### SUBSECTION (2).—*Interrogatories.*

**1275.** Prior to 1907 the examination, in cases where the application was made after allowance of proof or adjustment of issues, was made by means of "interrogatories, to be settled by the parties and approved of by one of the Principal Clerks of Session or Record Clerk."<sup>10</sup> Since that year, however, interrogatories may be dispensed with by the Court or a Lord Ordinary in all cases where the commission falls to be executed within the United Kingdom, and also where the commission is to be executed abroad, if most expedient in the interests of parties and conducive to the administration of justice.<sup>11</sup> They are, however, frequently retained as advantageous where the witness is abroad,<sup>12</sup> even where there is a large number of witnesses to be examined.<sup>13</sup> Interrogatories

<sup>1</sup> A.S., 3rd March 1922.

<sup>2</sup> A.S., 11th July 1828, s. 117.

<sup>3</sup> A.S., 16th February 1841, s. 9; C.A.S., F, iv. 3, 6.

<sup>4</sup> *Hansen v. Donaldson*, 1873, 1 R. 237; *Earl of Winton v. Kingston*, 1710 Mor. 12096; *A. v. B.*, 1831, 4 Deas & And. 252.

<sup>5</sup> *Watsons, Petrs.*, 1829, 8 S. 261; *Cameron, Petr.*, 1830, 8 S. 435 (note).

<sup>6</sup> A.S., 11th July 1828, S. 117.

<sup>7</sup> *Gray v. Sutherland*, 11 D. 1023; *M'Lean & Hope v. Fleming*, 1867, 5 M. 579; *Western Ranches, Ltd. v. Nelson's Trs.*, 1898, 25 R. 527; *Crawford & Law v. Allan S.S. Co., Ltd.*, 1908, 16 S.L.T. 434.

<sup>8</sup> *Morison v. Cowan*, 1828, 6 S. 1082; *Watsons, supra*; *Hunt v. Comrs. of Woods and Forests*, 1856, 18 D. 317.

<sup>9</sup> *Oswald v. Lawrie*, 1824, 3 S. 381; *Gardner v. Mags. of Kilrenny*, 1825, 3 S. 613; *Ramsay v. Cochrane*, 1825, 3 S. 643; *Aikman v. Aikmans*, 1852, 2 Stuart, 108.

<sup>10</sup> A.S., 16th February 1841, s. 17.

<sup>11</sup> A.S., 20th March 1907, s. 9 (C.A.S., B, ii. 2); *Crawford & Law, supra*.

<sup>12</sup> *M'Lean & Hope, supra*, per Lord Justice-Clerk Patton at p. 582.

<sup>13</sup> *Dexter & Carpenter v. Waugh & Robertson*, 1925 S.C. 28.

are written questions which are put by the commissioner to the witness as the basis of the examination, but he may at the diet put such additional questions to the witness as he may think necessary. The opposite party may move for a joint commission or frame cross-interrogatories to be put to the witness.<sup>1</sup>

#### SUBSECTION (3).—*Interlocutor.*

**1276.** The interlocutor granting commission nominates the commissioner and usually specifies the name or names of the witness or witnesses, appoints or dispenses with interrogatories, and appoints the depositions and productions to be transmitted to the clerk of the process with the commissioner's report either before a certain date or *quam primum*. In a petition for custody of a child in which it was remitted to a Sheriff-Substitute to make inquiry and take evidence, the interlocutor expressly directed him, "if he shall see cause to do so, to report upon the demeanour and credibility of the witnesses."<sup>2</sup> It is not now necessary to obtain extract of the interlocutor in order to put it into execution, a certified copy being sufficient.<sup>3</sup> Clerks of Court are directed to insert, in any interlocutor granting a commission to be executed outwith Scotland, a statement that such commission is to be sealed with the seal of Court before being issued.<sup>4</sup>

#### SUBSECTION (4).—*Reclaiming.*

**1277.** A reclaiming note against an interlocutor of the Lord Ordinary granting commission is only competent with leave,<sup>5</sup> and within ten days from the interlocutor taken to review.<sup>6</sup> While it has been decided that an interlocutor refusing a diligence to recover documents may be reclaimed against without leave as being a partial refusal of proof,<sup>7</sup> it is not clear whether that decision would apply to commissions to take the evidence of witnesses.

#### SUBSECTION (5).—*Commissioner.*

**1278.** According to the Act of Sederunt of 11th March 1800, if the proof was to be reported to the whole Court, the commission (unless otherwise ordered by the Court, upon special cause shewn) was directed only to one or other of the members of the Faculty of Advocates resident in Edinburgh and attending the Court, and of more than five years' standing or to such of the Sheriffs or Stewart-deputes as were resident in Edinburgh during session, or who undertook to attend the Court when

<sup>1</sup> A.S., 16th February 1841, S. 17.

<sup>2</sup> *Scott v. Scott*, 1913, 2 S.L.T. 278.

<sup>3</sup> Court of Session Act, 1850 (13 & 14 Vict. c. 36), s. 25.

<sup>4</sup> Memorandum to Clerks, 20th July 1886.

<sup>5</sup> *Stewart v. Kennedy*, 1890, 17 R. 755.

<sup>6</sup> Court of Session Act, 1850, s. 11; Court of Session Act, 1868 (31 & 32 Vict. c. 100), s. 54.

<sup>7</sup> *Thomson & Co. v. Bowater & Sons*, 1918 S.C. 316.



the state of the proof was ready to be prepared and while its merits were under discussion.<sup>1</sup> Upon special cause being shewn to the Court, however, in such cases, and where proofs were allowed by any of the Lords Ordinary to be reported to himself, especially in matters of smaller moment or where dispatch was necessary, the commission might be issued either to such commissioners as are above described, or to any Sheriff, or steward-depute, or substitute, or any other inferior magistrate, or the clerk, or assistant clerk of any Court, but in no case were parties or their agents allowed to name their own commissioners.<sup>2</sup> When the commission was to be executed furth of Scotland, it was directed to some person duly qualified, with appropriate regulations and instructions at the discretion of the Lord Ordinary or Court.<sup>3</sup>

1279. According to present practice, where the witness to be examined resides within a reasonable distance of Edinburgh, commission is granted to an advocate in attendance at the Parliament House. When the witness resides in Scotland, at a considerable distance from Edinburgh, a commissioner duly qualified and resident near the witness, such as a Sheriff-Substitute, is frequently appointed, but where there has already been an advocate commissioner in the case who is familiar with its details, he will be sent. Where a witness resides outwith the jurisdiction a local legal practitioner or a consul<sup>4</sup> is appointed, except when it is thought desirable, on account of the necessity for knowledge of Scottish law and procedure, and there is consent of parties, that an advocate should be sent. It is competent for a judge to be his own commissioner, but not expedient or desirable, and the practice will not be encouraged.<sup>5</sup> Appointments at the request of colonial or foreign tribunals have been already dealt with.<sup>6</sup>

#### SUBSECTION (6).—*Clerk, etc.*

1280. The commissioner appoints the clerk,<sup>7</sup> who is entitled to fees.<sup>8</sup> By agreement between parties a shorthand writer is usually appointed, who may be the clerk. A commissioner requires the authority of the Court to the employment of an accountant to assist him.<sup>9</sup> He may, however, in a division of commonty employ a land surveyor.<sup>10</sup>

#### SUBSECTION (7).—*Fixing Diet of Examination.*

1281. Where commission and diligence has been granted, it is the duty of the applicant's agent to procure and send to the commissioner

<sup>1</sup> A.S., 11th March 1800 (made perpetual by A.S., 22nd June 1809), s. 3.

<sup>2</sup> *Ibid.*, s. 5.

<sup>3</sup> *Ibid.*, s. 6; *MacLeod v. Crawford*, 1856, 18 D. 778.

<sup>4</sup> "*Hilda*" v. "*Australia*," 1885, 12 R. 547.

<sup>5</sup> *Baroness Gray v. Richardson*, 1874, 1 R. 1138.

<sup>6</sup> *Supra*, paras. 1269 and 1270.

<sup>7</sup> A.S., 11th March 1800, s. 4.

<sup>8</sup> *Ibid.*, s. 9.

<sup>9</sup> *Cassils & Co. v. Absalon*, 1907, 15 S.L.T. 48; *Wm. Whiteley, Ltd. v. Dobson, Molle & Co., Ltd.*, 1902, 10 S.L.T. 71; *Johannesburg Municipal Council v. Stewart & Co., Ltd.*, 1911, 1 S.L.T. 359.

<sup>10</sup> *Wilson, Petrs.*, 10th July 1813, F.C.

a certified copy of the interlocutor appointing him, together with a print of the record, and a letter asking him to fix a diet. The commissioner fixes the diet, usually to suit parties' convenience. Where a diligence was partially executed at a diet which had not been intimated to the defender, the commissioner, on the motion of defender, was directed to fix a new diet and intimate it to each of the parties, and meanwhile to return all documents produced at the first diet.<sup>1</sup>

#### SUBSECTION (8).—*Citation.*

**1282.** The certified copy of the interlocutor granting commission and diligence is the warrant for citing witnesses (and havers) to the diet. It is not now necessary to extract the interlocutor.<sup>2</sup> Citation may be personal, or at the dwelling-place, or by post, with appropriate executions. Where a witness, duly cited, refuses or fails to appear at the diet, the party citing him may move the Court or Lord Ordinary to grant letters of second diligence, on which the witness may be apprehended and brought before the commissioner.<sup>3</sup>

#### SUBSECTION (9).—*General Instructions to Commissioners.*

**1283.** These are contained in the Act of Sederunt,<sup>4</sup> and are applicable to the examination of witnesses and havers alike as follows: "To allow no matter to be introduced which is not pertinent to the cause, nor any unnecessary pleading or altercation about the competency of questions or the admissibility of witnesses, and to check the parties if they attempt to load the proceedings with unnecessary evidence or superfluous matter of any kind; to attend to the rules of evidence, and to give their own deliverances either *viva voce* or in writing; it being always understood that their whole proceedings shall be subject to the after-consideration of the Court, upon application by either party; in order to which the commissioner himself, or those acting for the parties, may take such notes on a separate paper as they think proper for the due information of the Court; but nothing shall enter the report but what the commissioner himself may think material." Further, if in the course of taking the depositions "it shall appear to the commissioner that any witness is not disposed to tell the truth, or behaves in any unusual manner, to take a note thereof at the time, by way of assistance to his memory, in case he should be appealed to on that subject by either of the parties when the proof comes to be advised; or if he thinks proper he may annex the same to his report of the proof."<sup>5</sup>

<sup>1</sup> *Craig v. Craig*, 1905, 13 S.L.T. 556.

<sup>2</sup> 13 & 14 Vict. c. 36, s. 25.

<sup>3</sup> Shand's Practice, pp. 354, 371; *Collins v. North British Bank*, 1851, 13 D. 541; *National Exchange Co. v. Drew & Dick*, 1858, 20 D. 837, per Lord Deas at p. 840.

<sup>4</sup> A.S., 11th March 1800 (see A.S., 22nd June 1809), s. 4.

<sup>5</sup> *Ibid.*, s. 7.

SUBSECTION (10).—*Procedure at Diet.*<sup>1</sup>

**1284.** The commissioner must be present throughout the course of the examination.<sup>2</sup> The commissioner administers the oath *de fidei administratione* to the clerk, and to the shorthand writer if any. If the clerk has not, as is usual, prepared beforehand the preamble of the report, setting forth the place and date of the diet, the commissioner's acceptance, the appointment of the clerk, the agreement of parties to employ a shorthand writer and to dispense with the signature of the witnesses to their depositions,<sup>3</sup> and the administration of the oath *de fidei*, this will be dictated by the commissioner. The clerk having noted those present, the first witness is sworn or makes an affirmation, which is noted by the clerk. Thereafter the witness is examined and the evidence recorded, in the same manner as at a proof. Cross-examination and re-examination may follow. Where there is no shorthand writer and signature of the deposition is not dispensed with, the deposition, as written down by the clerk, is read over to the witness, and the words "all which is truth, as the deponent shall answer to God," are added. The absence of these words does not annul the deposition unless it has not been stated that the witness was duly sworn.<sup>4</sup> The witness subscribes each page of the deposition, and authenticates any alterations, which should be marginal and not interlineations, by signing his Christian name on one side of these and his surname on the other. If a witness cannot write, this fact, and the cause, should be noted in the deposition.

**1285.** The signature of the commissioner at the same places as the deponent is essential,<sup>5</sup> and it is usual for the clerk also to sign. That a proof by commission did not bear that the oath *de fidei* was administered to the clerk, and that the clerk had not signed the proof, were held not to be valid objections to it.<sup>6</sup> The depositions of any further witnesses, and all envelopes containing depositions taken on separate papers, are authenticated in like manner. If the examination cannot be completed in one day, a short note of adjournment is made and signed by the commissioner and clerk, and on reassembling a short preamble recites the adjourned diet. At the close of the diet the proceedings are docketed and subscribed by the commissioner and clerk, and form the report of the commission.

**1286.** The commissioner, whether the examination is upon interrogatories or not, may put such additional questions as he thinks necessary, these being noted as having been put by him. He must also give his decision upon any question raised as to the competency of a line of

<sup>1</sup> Maclaren, Court of Session Practice, p. 1048.

<sup>2</sup> *Jaffray v. Murray*, 1830, 8 S. 667.

<sup>3</sup> *Laird v. Scott*, 1914, 1 S.L.T. 368.

<sup>4</sup> *Galloway v. Gilmer*, 1830, 2 Deas & And. 218; *A. B.*, 1838, 16 S. 630.

<sup>5</sup> *Robb v. Campbell*, 1824, 3 S. 301; *Strachan v. Tomlins*, 1825, 3 S. 560; *Baxter v. Kilgour*, 1825, 3 S. 595; *M'Phun v. Reid*, 1836, 14 S. 339.

<sup>6</sup> *Robertson v. Mason*, 1841, 4 D. 159.



examination or a particular question, and, if not taken exception to, his decision is final. If it is excepted to, the evidence should be taken down on a separate paper and sealed up for the decision of the Court or Lord Ordinary. If it is then held competent, it is inserted by the clerk or shorthand writer at its proper place in the report; if not, it is destroyed.<sup>1</sup>

SUBSECTION (11).—*Reporting the Commission.*

1287. The commission falls to be reported by the party applying for it. If the interlocutor granting the commission expressly fixes a day on or before which it is to be reported, it will “not be prorogated, nor the diligence renewed, except on payment of such previous expenses as the Lord Ordinary or the Court shall modify, unless, before the lapse of the time so fixed, special application shall be made for such prorogation; and it shall only be granted on cause shewn; and the party failing to report a diligence shall be held to have abandoned his wish to recover writings by a diligence, and circumduction shall be granted for not reporting; and the like rule shall be followed in the case of commissions granted for taking proofs, declarations, or oaths of parties.”<sup>2</sup> A commission may be appointed to be reported on any box day in vacation or recess.<sup>3</sup> Consent of parties is not sufficient to prorogate the time for reporting,<sup>4</sup> but prorogation may be granted if the cause has been enrolled for that purpose before the time has expired, even if the time expires between enrolment and the making of the motion.<sup>5</sup> A second prorogation has been granted in special circumstances.<sup>6</sup>

SUBSECTION (12).—*Use of Depositions at Proof or Trial.*

1288. “It being established at the trial, to the satisfaction of the Court, by affidavit, or by oath in open Court, that such witness is dead, or cannot attend owing to absence, age, or permanent infirmity, it shall be competent to use at the trial the evidence so taken, subject to all legal objections to its admissibility; . . . when one party obtains a commission to examine witnesses, and does not use the evidence obtained under the commission, the other party may use the evidence given under it at the trial, provided he satisfies the Court at the trial that he could not bring the witness or witnesses whose evidence he proposes to read, in which case he shall be liable for the expenses of the commission. The depositions taken on commission shall not be used if the witnesses so examined shall afterwards be brought forward at the trial,”<sup>7</sup> and legal evidence of the inability to attend is not necessary if

<sup>1</sup> Maclaren, Court of Session Practice, pp. 1049, 1050.

<sup>2</sup> A.S., 11th July 1828, s. 108; C.A.S., B, ii. 6.

<sup>3</sup> Court of Session Act, 1850 (13 & 14 Vict. c. 36), s. 27.

<sup>4</sup> Court of Session Act, 1868 (31 & 32 Vict. c. 100), s. 26.

<sup>5</sup> *Masson v. Masson*, 1829, 7 S. 771; *Dingwall v. Fisher*, 1909 S.C. 745; cf. *Craig v. Jax-Blake*, 1871, 9 M. 715.

<sup>6</sup> *Weild v. Weild*, 1827, 6 S. 247.

<sup>7</sup> A.S., 16th February 1841, s. 17.



the judge is satisfied by any sufficient evidence.<sup>1</sup> The ruling principle is that the best evidence accessible for the trial should be produced.<sup>2</sup> Where the deposition of a foreigner resident abroad has been taken, it is unnecessary to prove that he is unable to appear.<sup>3</sup> If a witness whose deposition has been taken is alive and in this country at the date of the trial, the opposite party can demand a re-examination, but unless such demand is made, the deposition may competently be used.<sup>4</sup> The practice is not to insist upon re-examination.<sup>5</sup>

#### SUBSECTION (13).—*Fees of Commissioner, etc.*<sup>6</sup>

**1289.** Where it was usual to take the whole proof on commission, the regulations provided for the remuneration of the commissioner and his clerk, and directed that a certificate of the payment of such remuneration must be signed by the clerk of Court and lodged in process before any such proof could be advised.<sup>7</sup> The same regulation apparently still applies to any commission granted by the Court, although the provision as to the certificate of the clerk of Court is not now observed, fees being decerned for upon motion<sup>8</sup> made in the cause, if they have not, as is proper,<sup>9</sup> been paid when incurred. A separate action for fees is quite competent.<sup>9</sup> "The general principle is that wherever a person of skill or a professional man is appointed or authorised to do anything under the orders of the Court, the Court will enforce payment of his remuneration or expenses against both parties conjunctly or severally."<sup>10</sup> The agent is also personally liable to the commissioner, with a right to recover half from the opposite agent personally.<sup>11</sup> Where, however, an inferior judge is directed by the Court to make inquiry and report, he is bound to accept the remit and execute it as part of his proper judicial functions, and is not entitled to remuneration.<sup>8</sup> A commissioner's fee varies from £5, 5s. to £10, 10s. *per diem*, according to the nature of the case and the time occupied.<sup>12</sup> The clerk to the commissioner is entitled to remuneration for attendance and writings and expenses,<sup>13</sup> and so also are other persons properly employed by the commissioner, *e.g.* a land surveyor in a division of commonry.<sup>14</sup>

<sup>1</sup> *Willox v. Farrell*, 1848, 10 D. 807, per Lord Mackenzie at p. 811; cf. *Scott v. Gray*, 1826, 4 Murray, 63.

<sup>2</sup> *Boettcher v. Carron Co.*, 1861, 23 D. 322; cf. *Watson v. Glass*, 1837, 15 S. 753.

<sup>3</sup> *Ainslie v. Sutton*, 1851, 14 D. 184.

<sup>4</sup> *Boettcher*, *supra*, per Lord Cowan at pp. 325, 326.

<sup>5</sup> Maclaren, Court of Session Practice, p. 1034.

<sup>6</sup> A.S., 11th March 1800, s. 9.

<sup>7</sup> *Dyce*, 1868, 7 M. 31.

<sup>8</sup> *M'Lachlan v. Flowerdew*, 1851, 13 D. 1345.

<sup>9</sup> *Brodie v. Cawdor*, 1836, 14 S. 1097; *Beattie and Another, Compearers*, 1873, 11 M. 954, per Lord Pres. Inglis.

<sup>10</sup> *A. B. v. C. D.*, 1843, 6 D. 95; *M'Lachlan*, *supra*.

<sup>11</sup> *Tannet, Walker & Co. v. Hannay & Sons*, 1874, 1 R. 440; *Menzies v. Baird*, 12th December 1911 (Maclaren, Expenses, Appendix X. p. 645); "*Hilda*" v. "*Australia*," 1885, 12 R. 547.

<sup>12</sup> For Specimen Clerk's Account, see Maclaren, Expenses, Appendix IV. p. 584.

<sup>13</sup> *Wilson, Petr.*, 10th July 1813, F.C.

SUBSECTION (14).—*Expenses of the Commission.*<sup>1</sup>

**1290.** In general, expenses follow success in the cause. Although a commission has been returned unexecuted, the expense of it will be allowed if the attempt to execute it was reasonable.<sup>2</sup> Where a witness who has been examined on commission at the instance of one party ultimately appears and gives his evidence at the proof or trial, the expenses of the commission will not, in general, be allowed against the opposite party,<sup>3</sup> but this is subject to exception, *e.g.* where the examination only proved unnecessary owing to the witness's unforeseen return to this country.<sup>4</sup> Where such a witness is brought to the proof or trial, but not then examined,<sup>5</sup> or where his deposition is not required owing to admissions made between his examination and the diet of trial,<sup>6</sup> the expense of the commission is not payable by the opposite unsuccessful party. The attendance of counsel at the diet is a proper charge where interrogatories have been dispensed with, and it has always been the practice to allow fees to counsel for preparing or revising interrogatories and cross-interrogatories.<sup>7</sup> In commissions executed at a distance, *e.g.* in London, whether the attendance of an Edinburgh agent is justified is a question of circumstances.<sup>8</sup> Where the examination is on interrogatories such attendance will not be allowed, but the charges of a London solicitor will be;<sup>9</sup> where not upon interrogatories the expense of attendance by an Edinburgh agent will be allowed.<sup>10</sup> A party, himself a professional man, who attended personally in London was held entitled to this charge, but not to the additional expense of a London agent except as regards carrying out the party's instructions communicated from Edinburgh prior to his departure.<sup>10</sup> Attendance of a doctor upon a party to examine her with a view to making affidavit of her inability to attend the trial has been held a good charge.<sup>11</sup>

## PART III.—COMMISSION AND DILIGENCE FOR THE RECOVERY OF DOCUMENTS.

## SECTION 1.—COMPULSORY PRODUCTION OF DOCUMENTS GENERALLY.

SUBSECTION (1).—*By Action or Order of Court.*

**1291.** Documents to which any person, whether a litigant in a depending action or not, has a right of ownership or possession may be recovered

<sup>1</sup> Maclaren, *Expenses*, pp. 491–494.<sup>2</sup> *Napier v. Leith*, 1860, 22 D. 1262.<sup>3</sup> *Napier v. Campbell*, 1843, 5 D. 858; *Maclaine v. Cooper*, 1846, 8 D. 429; *Napier v. Leith*, *supra*.<sup>4</sup> *Couper v. Cullen*, 1874, 1 R. 1101.<sup>5</sup> *Parker v. North British Rly.*, 1900, 8 S.L.T. 18.<sup>6</sup> *Swayne v. Fife Bank*, 1836, 14 S. 971.<sup>7</sup> *Gibb & M'Donald v. Baghott*, 1830, 2 Sc. Jur. 190; *Ellis v. Paton*, 1860, 22 D. 870.<sup>8</sup> *Armstrong's Trs. v. Leith Banking Co.*, 1834, 12 S. 510.<sup>9</sup> *Lumsden v. Hamilton*, 1845, 7 D. 300.<sup>10</sup> *Cuthbertson v. Elliott*, 1860, 22 D. 389; see also *Ellis v. Paton*, *supra*.<sup>11</sup> *Scott v. Craig*, 1894, 32 S.L.R. 39.

by him in an action for delivery or other appropriate process. Documents to which he has no such right, which are not in his hands, and to which he requires access as a litigant for the purpose of proving his case, may under certain conditions be recovered in the action in which he is litigant, whether they are in the hands of his opponents in the action or in the hands of third parties. Where the documents are in the hands of a party to the cause, the Court may order that party to produce them.

1292. The power to make such order appears to be inherent in the Court of Session from its institution.<sup>1</sup> It was formerly enforced by a fine in the case of non-production,<sup>2</sup> but according to present practice, a party who fails to produce the documents within the specified time ordered will have the case decided against him, although he may be reponed on reclaiming note if he produces the documents and pays the expenses caused by his failure to produce.<sup>3</sup> In a recent case the defender was ordained to produce within seven days two letters mentioned on record which the pursuer alleged were necessary to enable him to complete his record, the defender's contention that it was necessary to proceed by way of commission and diligence being rejected.<sup>4</sup> In another recent case the pursuer was ordained to produce certain documents *quam primum*.<sup>5</sup>

#### SUBSECTION (2).—*By Commission and Diligence.*

1293. An alternative method of recovery where the documents are in the hands of a party, and in practice the more usual, is recovery by "commission and diligence to examine havers." This is the only method where the documents required are in the hands of third parties. The power to grant such commission and diligence also appears to have been inherent in the Court.<sup>6</sup> When proof by commission in the Court of Session was virtually abolished by the Evidence (Scotland) Act, 1866, it was expressly provided that "it shall be competent to the judges of either Division of the Court or to the Lord Ordinary to grant commission to any person competent to take and report in writing the depositions of havers."<sup>7</sup> "Havers" are all persons who have documents in their possession or custody, whether parties to the action or not. The haver may be a company or corporation, and in that case a responsible official or agent may be cited to make a deposition and produce the documents. The recovery of documents was formerly known as "exhibition,"<sup>8</sup>

<sup>1</sup> Maclaren, Court of Session Practice, p. 1058; see Act, 1672, c. 40 (record ed.), c. 15 (12mo ed.), s. 25; *Paton v. Paton*, 1668, Mor. 3963.

<sup>2</sup> A.S., 20th November 1711, s. 17.

<sup>3</sup> *Napier v. Douglas*, 1825, 4 S. 325 (N.E. 329); *Dinsdale v. Ware*, 1829, 8 S. 262.

<sup>4</sup> *Bradley v. Maguire*, 1920, 2 S.L.T. 417.

<sup>5</sup> *Reavis v. Clan Line Steamers*, 1926 S.C. 215.

<sup>6</sup> Maclaren, Court of Session Practice, p. 1058; Act, 1672, *supra*.

<sup>7</sup> Evidence (Scotland) Act, 1866 (29 & 30 Vict. c. 112), s. 2.

<sup>8</sup> Mor. Dict., 3959 *et seq.*



and it is analogous to the English motion for discovery.<sup>1</sup> Commission and diligence is appropriate only for the recovery *in modum probationis* of documents which are not in the ownership or possession of the litigant. It is not appropriate for obtaining the *corpora* of moveable objects, such as models, required at a proof or trial,<sup>2</sup> nor for obtaining access to the notes of evidence in another process, such as a fatal accidents inquiry.<sup>3</sup>

**1294.** The power to grant such commissions now extends to all actions, including consistorial causes,<sup>4</sup> actually in dependence.<sup>5</sup> Application is made to the Court or Lord Ordinary before whom the action is in dependence, and in vacation to the Lord Ordinary on the Bills.<sup>6</sup> When the action is in dependence, but not before any particular Court or Lord Ordinary, it is thought, following the analogy of commissions to take the evidence of witnesses, that application should be made by petition to the Inner House.<sup>7</sup> In one case, where the summons had been executed but not called, a motion to the Lord Ordinary, before whom it was proposed to call the summons, was granted.<sup>8</sup> Where the action is depending in the Inner House, application is by note in the Single Bills; where before a Lord Ordinary, by motion. The note or notice of motion with relative specification of documents must be lodged thirty-six hours before the application is made, and at the same time intimated to the opposite party.<sup>9</sup> A joint commission may be applied for by the parties.<sup>10</sup>

#### SUBSECTION (3).—*Church Courts.*

**1295.** In the Church Courts the same method should be adopted to recover documents as to compel the attendance of witnesses. An application should be made by the Church Court to the Sheriff,<sup>11</sup> or Court of Session.<sup>12</sup> In the case cited the Courts of the Church of Scotland are referred to as being “regularly constituted judicatures of the realm,”<sup>13</sup> and the Court did not decide whether the civil Courts would lend their aid to the voluntarily constituted “Courts” of other churches, but one judge was of opinion that such aid ought to be given.<sup>14</sup> The Scottish Ecclesiastical Commissioners have by statute the same powers as Courts of law to enforce the attendance and examination of witnesses and the production of books and documents.<sup>15</sup>

<sup>1</sup> Mackay, Manual, p. 241; but see *M'Cowan v. Wright*, 15 D. 229, per Lord Justice-Clerk Hope at p. 232.

<sup>2</sup> *H.M. Advocate v. Fleming*, 1864, 2 M. 1032, at p. 1063.

<sup>3</sup> *Brown v. Glenboig Union Fireclay Co., Ltd.*, 1911, 1 S.L.T. 27.

<sup>4</sup> Court of Session Act, 1868 (31 & 32 Vict. c. 100), s. 100 (2).

<sup>5</sup> Mackay's Practice, vol. i. p. 468.

<sup>6</sup> Court of Session Act, 1868, s. 93.

<sup>7</sup> MacLaren, Court of Session Practice, pp. 1059, 1071–72.

<sup>8</sup> *Braby & Co., Ltd. v. Story*, 1896, 3 S.L.T. 325.

<sup>9</sup> A.S., 16th February 1841, s. 9; C.A.S., F, iv. 3, 6.

<sup>10</sup> *Ibid.*, s. 17.

<sup>11</sup> *Presbytery of Lews v. Fraser*, 1874, 1 R. 888.

<sup>12</sup> Mackay, Manual, p. 115.

<sup>13</sup> *Presbytery of Lews*, *supra*, per Lord Pres. Inglis.

<sup>14</sup> *Ibid.*, per Lord Ardmillan at p. 894.

<sup>15</sup> Church of Scotland (Property and Endowments) Act, 1925 (15 & 16 Geo. V. c. 33), s. 20 (5).



SUBSECTION (4).—*Arbitrations.*

**1296.** In arbitration proceedings the arbiter, being a “private person in whom the law has not vested jurisdiction,” has no power to compel havers to produce documents before him, but on the application of the arbiter,<sup>1</sup> or of a party,<sup>2</sup> or, as is the better practice, of the party with concurrence of the arbiter, the Court of Session will compel both the attendance of witnesses and the production of documents.<sup>3</sup> A petition for this purpose must be presented to the Court (not in the Bill Chamber),<sup>4</sup> and the specification of the documents of which recovery is sought must first be approved by the arbiter.<sup>5</sup> A commission to examine havers should be obtained from the arbiter, and the authority of the Court will be interponed thereto, on a petition being presented. If the haver, duly cited in an arbitration proceeding, refuse to produce a document, the party calling for it may petition the Sheriff to ordain such haver to produce, on pain of imprisonment. The Sheriff must consider on its merits any objection to production stated by the haver.<sup>6</sup>

## SECTION 2.—WHEN APPLICATION MAY BE MADE.

SUBSECTION (1).—*General Rules.*

**1297.** In the ordinary case the motion is appropriately made after the record has been closed and proof allowed or issues adjusted, for the purpose of the recovery is to enable the party to prove his case, and the facts which he is entitled to prove are determined by his averments on record. A motion for commission to examine havers is not, however, incompetent at an earlier stage of the proceedings, so long as there is an action actually in Court. It may be made at any time after the summons has been executed,<sup>7</sup> and possibly even before that, by petition.

SUBSECTION (2).—*Application before Record Closed.*

**1298.** The grant of commission and diligence to recover documents before closing of the record is viewed by the Court as an exceptional measure, for which special cause must be shewn.<sup>8</sup> It is in the discretion of the Lord Ordinary to grant or refuse, and the Court will not lightly interfere with his decision.<sup>9</sup> The following are examples of circumstances in which commissions have been granted: Where a pursuer

<sup>1</sup> *Ker v. Scot*, 1670, Mor. 634.

<sup>2</sup> *Stevenson v. Young*, 1696, Mor. 634.

<sup>3</sup> *Blaikie v. Aberdeen Rly. Co.*, 1851, 13 D. 1307; 1852, 14 D. 590.

<sup>4</sup> *Harvey v. Gibsons*, 1826, 4 S. 809.

<sup>5</sup> *Crichton v. North British Rly. Co.*, 1888, 15 R. 784.

<sup>6</sup> *Blaikie, supra.*

<sup>7</sup> *Brady & Co., Ltd. v. Story*, 1896, 3 S.L.T. 325; see also *Greig v. Crosbie*, 1855, 18 D. 193, per Lord Deas at p. 196.

<sup>8</sup> *National Exchange Co. of Glasgow v. Glasgow, Kilmarnock, and Ardrossan Rly. Co.*, 1849, 12 D. 249; *Dalgleish's Trs. v. Matheson's Trs.*, 1902, 10 S.L.T. 56.

<sup>9</sup> *M'Ilquham & Co. v. Caledonian Rly. Co.*, 1850, 13 D. 403.

desired to recover an unstamped writing which had been left in the defender's hands, upon which his action was founded, for the purpose of getting it stamped and avoiding a penalty;<sup>1</sup> where pursuers had right to the documents, and were in a position to compel delivery by an action of exhibition and delivery, and the documents were required to enable them to make distinct averments;<sup>2</sup> where a party who has stated his case in general terms could make it specific only by the help of the documents to which he has not had access;<sup>3</sup> and where the averments of one party could not be either admitted or denied by the other without reference to documents.<sup>4</sup> In an action by an engineer against a railway company for a balance due upon his accounts for engineering work, the company obtained a diligence for recovery of the books on which pursuer's account was founded.<sup>5</sup> Diligence has also been granted before the closing of the record where the pursuer averred fraud;<sup>6</sup> to enable the defender in a breach of promise case to see letters written by him to the pursuer;<sup>7</sup> to enable a judicial factor, pursuer on a bill which he had found in the papers of a sequestrated company, and of which he did not know the history, to inspect the records of the defenders, a town council, at sight of the commissioner;<sup>8</sup> in an action on a policy of insurance, for recovery by defenders from the pursuers, of all reports and surveys relative to the present condition of a vessel belonging to the pursuers and alleged to be a wreck;<sup>9</sup> for recovery of their lease and relative correspondence, by tenants of a railway company who were respondents in an interdict against proceeding to arbitration in respect of compulsory removal;<sup>10</sup> to enable the pursuer in an action of accounting against a defender alleged to be conducting a business for pursuer, where the defender alleged that he had purchased the business, to recover the books of the business.<sup>11</sup> The conclusive consideration is that, while the purpose of such a diligence is not to enable a party to state a case, but to prove the case which he has stated, it may, nevertheless, be necessary for him, in order that he may be able to prove his case later, to have sight of such documents as will enable him to state his case with sufficient distinctness and specification. The tendency is to relax the rule against granting diligence before the record is closed.<sup>12</sup>

**1299.** If a party, however, comes into Court without knowing exactly what his case is, but hoping to make out a case from documents recovered,

<sup>1</sup> *Braby & Co., Ltd. v. Story*, 1896, 3 S.L.T., 325.

<sup>2</sup> *Moreton and Ors. v. Lockhart*, 1849, 22 Sc. Jur. 81; see *Bradley v. Maguire*, 1920, 2 S.L.T. 417.

<sup>3</sup> *Greig v. Crosbie*, 1855, 18 D. 193; see also *Donaldson v. Bannatyne*, 1828, 7 S. 130.

<sup>4</sup> *Maconochie v. Paul*, 1841, 3 D. 1261.

<sup>5</sup> *Miller v. Edinburgh and Glasgow Rly. Co.*, 1849, 11 D. 1012.

<sup>6</sup> *Davidson v. Lyall*, 1824, 3 S. 8 (N.E. 6).

<sup>7</sup> *Henderson v. Lumsden*, 1838, 16 S. 398.

<sup>8</sup> *Fullarton v. Dumbarton Magistrates*, 1833, 11 S. 361.

<sup>9</sup> *Marshall & Sons v. Spiers and Ors.*, 1882, 19 S.L.R. 696.

<sup>10</sup> *Caledonian Rly. Co. v. Crockett & Co.*, 1902, 10 S.L.T. 89.

<sup>11</sup> *Currer v. Dickson*, 1857, 19 D. 991.

<sup>12</sup> *Marshall & Sons*, *supra*, per Lord Fraser.

it may be from his opponent, he will not be granted facilities. Such a diligence is known as a "fishing diligence."<sup>1</sup> Commission has been refused where the applicant's averments were considered to be already sufficiently precise, and the diligence appeared to be asked for in order to disprove the opposite party's statements.<sup>2</sup>

SUBSECTION (3).—*Application after Record Closed.*

**1300.** In the absence of special circumstances of the kind noted above, commission to recover documents is normally granted after the record is closed, its main purpose being to enable the applicant to prove the averments he has made on record. It is not usual, however, to grant commission before the preliminary pleas have been dealt with, because if such pleas are sustained they may exclude proof.<sup>3</sup> When a defender in an action for payment of calls denied that he was a shareholder and asked for diligence to recover documents to prove that the pursuers' register of shareholders was fabricated, contending that production of the documents would obviate the necessity of a jury trial, the Court refused the motion *hoc statu*, suspecting obstruction and not being satisfied that production of the documents would render the trial unnecessary.<sup>4</sup> Where the competency of an action had been upheld and issues approved, and an appeal against these interlocutors taken to the House of Lords, diligence was granted to the pursuer to recover documents with a view to preparing the case for trial. It was pointed out that the diligence was taken *periculo petentis*.<sup>5</sup> Diligence may be granted before issues have been adjusted, in order to recover documents the exact wording of which it is desirable to quote in the schedule to the issue, even where there are preliminary pleas to be disposed of at adjustment of issues.<sup>6</sup> In the normal case the application will be made in preparation for a proof or trial which has been allowed, and it should be made in good time in order to enable documents recovered to be lodged in process four days before the proof<sup>7</sup> or eight days before a jury trial.<sup>8</sup> Diligence moved for within eight days of a trial has been refused.<sup>9</sup> Where, however, a proof had been adjourned in the course of the defender's evidence, the Court, on a report by the Lord Ordinary, allowed

<sup>1</sup> *Mackintosh v. Macqueen*, 1828, 6 S. 784; *Lumsdaine v. Balfour*, 1828, 7 S. 7; *Greig v. Crosbie*, 1855, 18 D. 193.

<sup>2</sup> *Forbes v. Ure*, 1854, 16 D. 640.

<sup>3</sup> *Greig v. Crosbie*, *supra*, per Lord Pres. M'Neill at p. 195; *Paterson v. Baxter*, 1856, 19 D. 37.

<sup>4</sup> *Caledonian and Dumbartonshire Rly. Co. v. Lockhart*, 1852, 14 D. 492.

<sup>5</sup> *Forbes v. Campbell*, 1857, 20 D. 287; but see Lord Cowan at p. 289: Court of Session Act, 1850 (13 & 14 Vict. c. 36), s. 13.

<sup>6</sup> *Rose v. MacLeod*, 1824, 3 S. 79; *Stephen v. Paterson*, 1865, 3 M. 571; *Gracie-Hunter v. Glasgow Iron and Steel Co., Ltd.*, 1908, 16 S.L.T. 15; cf. *Ellis v. National Free Labour Association*, 1905, 7 F. 629.

<sup>7</sup> C.A.S., B, ii. 1; but see *Liquidator of the Universal Stock Exchange Co., Ltd. v. Howat*, 1891, 19 R. 128.

<sup>8</sup> C.A.S., F, i. 10.

<sup>9</sup> *Murphy v. Clyde Navigation Trs.*, 1902, 4 F. 653.



the defender a diligence to recover documents which had been referred to in the course of the proof.<sup>1</sup>

### SECTION 3.—THE SPECIFICATION OF DOCUMENTS.

**1301.** In order to inform the judge of the scope of the investigation which he is asked to sanction, and to enable him in granting diligence to set a definite limit to the inquiry, the application for a diligence is accompanied by a document known as the "Specification of Documents for the recovery of which a diligence is sought by" the pursuer or defender. The specification is the commissioner's sole guide to the documents about which the persons cited as havers may be questioned, and is conclusive for him of the scope of his commission. The specification should "contain an articulate statement of the particular and general documents, or classes of documents, which are sought to be recovered, with the intention of shewing, or tending to shew, the accuracy of any or all of the averments, or denials, on record."<sup>2</sup> Correspondence subsequent to the date when its subject has become litigious would not in the ordinary case be recoverable, and a "call," therefore, has generally to be limited by that date at least. The names of the parties who are believed to be in possession of the documents are not set forth, but, after the diligence is obtained, any person believed to have them in possession or to know where they may be found may be cited to appear before the commissioner and to depone to what he knows about them. "The draughtsman of a specification . . . ought to frame the articles of his call with distinct reference to the issues of fact upon which the documents are supposed to have a bearing. Unfortunately, that practice is too often not followed, and a general call is made for all documents, wherever they may be or in whose hands they may be, that are supposed to have any bearing upon any question that is mentioned upon record. The result is that processes are frequently encumbered by quite useless documents, and an enormous amount of unnecessary expense is caused to litigants."<sup>3</sup> Where a call is made for all books shewing or tending to shew the truth of a particular averment, unless the manner in which the books have been kept is in question, the call should be made "in order that excerpts may be taken therefrom at the sight of the commissioner." The specification concludes with a call for "drafts, copies, or duplicates of the above," failing principals. A party who does not attempt to shew that the principals of letters are not available is not entitled to recover the letter-books containing copies of these letters.<sup>4</sup> The Court or Lord Ordinary will either refuse the commission and diligence, *de plano* or *hoc statu*, or grant it with approval of the specification, with or without modification of its terms.

<sup>1</sup> *Baroness Gray v. Richardson*, 1874, 1 R. 1138.

<sup>2</sup> *MacLaren*, Court of Session Practice, p. 1072.

<sup>3</sup> *Paterson v. Paterson*, 1919, 1 S.L.T. 12, per Lord Hunter.

<sup>4</sup> *Caledonian Rly. Co. v. Symington*, 1912 S.C. 1033.



## SECTION 4.—LIMITATIONS ON COMPULSORY PRODUCTION OF DOCUMENTS.

SUBSECTION (1).—*General Principles.*(i) *Relevance to Averments admitted to Probation.*

**1302.** The recovery of documents is allowed for the purpose of enabling parties to prove their averments. It follows that the documents for which diligence will be granted include, in the first place, these which may be put in evidence in the cause.<sup>1</sup> This capability of being used in evidence has sometimes been set up as a criterion by which to determine whether documents ought to be recovered, but it is not a sound criterion. There is no rule that the documents must be determined beforehand to be clearly admissible in evidence.<sup>2</sup> It has been held that, where the documents are such that they cannot be made evidence in the cause in any circumstances, they are not recoverable by diligence.<sup>3</sup> But this statement appears to be too wide. There may be documents which a party is entitled to recover, although they would not be evidence in the cause.<sup>4</sup> Probably all documents which are expressly referred to in the pleadings are recoverable.<sup>5</sup> A Lord Ordinary is entitled to discriminate between averments which are, and are not, crucial, and to use his discretion as to the length to which investigation should go.<sup>6</sup> It is a recognised maxim that if the sole purpose which the documents can be made to serve is that of facilitating the cross-examination of an opponent's witnesses, diligence will not be granted.<sup>7</sup> At one time a condescendence of the purpose for which a document was required might be ordered,<sup>8</sup> but in modern practice any explanation required is offered at the Bar, and the right to recover is determined solely by reference to the averments on record.

**1303.** The question of the extent of investigation to be permitted is a difficult one. Very wide and comprehensive diligences have sometimes been granted. At one time a diligence was granted which called for "all documents tending to instruct the averments and denials of the pursuer in the case."<sup>9</sup> But some limitation is clearly necessary, for, as Erskine says, "If a general description were sufficient, one might upon irrelevant or vague allegations compel his adversary to expose to him his

<sup>1</sup> *Mackintosh v. Macqueen*, 1828, 6 S. 784.

<sup>2</sup> *Livingstone v. Dinwoodie*, 1860, 22 D. 1333, per Lord Justice-Clerk Inglis at p. 1334; *Porter v. Phoenix Assurance Co.*, 1867, 5 M. 533; *MacKirdy v. Glasgow and Transal Options, Ltd.*, 1903, 40 S.L.R. 313, per Lord Kinnear at p. 314.

<sup>3</sup> *Livingstone*, *supra*; see also *MacKirdy*, *supra*.

<sup>4</sup> *Admiralty v. Aberdeen Steam Trawling and Fishing Co., Ltd.*, 1909 S.C. 335, per Lord Pres. Dunedin at p. 340, Lord Kinnear at p. 343; see also *Scott and Ors. v. Portsoy Harbour Co.*, 1900, 8 S.L.T. 38.

<sup>5</sup> *Noble v. Scott*, 1843, 5 D. 723, per Lord Justice-Clerk Hope at p. 727; cf. *Ogston & Tennant, Ltd. v. "Daily Record," Glasgow, Ltd.*, 1909 S.C. 1000.

<sup>6</sup> *Macqueen v. Mackie & Co.*, 1920 S.C. 544.

<sup>7</sup> *Livingstone v. Dinwoodie*, *supra*.

<sup>8</sup> *Kennedy v. Hope and Ors.*, 1830, 8 S. 1029.

<sup>9</sup> *Foggo v. Hill and Ors.*, 1839, 1 D. 1238.

whole title-deeds with all their defects." And again, "*Nemo tenetur edere instrumenta contra se.*"<sup>1</sup> The extreme latitude of specification quoted above has not been approved or adopted in practice.<sup>2</sup> It was observed in a recent case that a diligence had never yet been granted to recover correspondence between a party to an action and "the world in general."<sup>3</sup> The Court has always been opposed to the type of diligence which has been described as "a fishing search among all the papers of the pursuer."<sup>4</sup> Where a party finds on part of a correspondence, his opponent is entitled to recover the remainder of it.<sup>5</sup>

1304. After proof has been allowed, the averments remitted to probation are the measure of the scope of the recovery which will be granted. So strictly is this test applied, that where a pursuer had been allowed a proof and the defender a conjunct probation, the defender was not allowed a diligence to recover documents which would be evidence only of a substantive case made by him on record but not remitted to probation.<sup>6</sup> Where a proof has been allowed the Court will not be deterred from allowing recovery of documents by doubts as to the relevancy of any of the averments.<sup>7</sup> In an action of interdict and damages in respect of infringement of a patent, proof was allowed of pursuer's averments, and as it could not be separated, a motion to recover business books was granted, although books would be of no use if the patent were bad.<sup>8</sup> A party proposing to amend his record has been refused a diligence to recover documents in order to make his statement specific.<sup>9</sup>

## (ii) *Private Documents Protected.*

1305. The private nature of documents will always be respected as far as possible. Precognitions;<sup>10</sup> the private books of a partner demanded in order to establish a fact provable only by the firm's writ;<sup>11</sup> the diary of a living person, in general;<sup>12</sup> letters written but not sent;<sup>13</sup> defences prepared but not lodged;<sup>14</sup> memorials laid before counsel for opinion;<sup>15</sup> documents prepared with reference to any action, or contemplated action

<sup>1</sup> Ersk. Inst. iv. 1, 52.

<sup>2</sup> *Scott v. Napier*, 1737, Mor. 358; 1749, 1 Pat. App. 441; *Fisher v. Bontine*, 1827, 6 S. 330; *Pattinson v. Robertson*, 1844, 6 D. 944; *Greig v. Crosbie*, 1855, 18 D. 193; *Riggs v. Drummond*, 1861, 23 D. 1251; *Earl of Lauderdale v. Scrymgeour Wedderburn*, 1905, 7 F. 1045, per Lord Pres. Kinross at p. 1047 and Lord M'Laren at p. 1048.

<sup>3</sup> *Ogston & Tennant, Ltd. v. "Daily Record," Glasgow, Ltd.*, *supra*.

<sup>4</sup> *Pattinson, supra*; but see *Earl of Lauderdale, supra*.

<sup>5</sup> *Stevenson v. Kyle*, 1849, 11 D. 1086; *Clavering v. M'Cunn*, 1881, 19 S.L.R. 139.

<sup>6</sup> *Scott, Simpson & Wallis v. Forrest & Turnbull*, 1897, 24 R. 877.

<sup>7</sup> *Duke of Hamilton's Trs. v. Woodside Coal Co.*, 1897, 24 R. 294.

<sup>8</sup> *Brown v. Evered*, 1904, 12 S.L.T. 121.

<sup>9</sup> *Thomson v. Gordon*, 1869, 7 M. 687.

<sup>10</sup> *Arthur v. Lindsay*, 1895, 22 R. 904.

<sup>11</sup> *Catto, Thomson & Co. v. Thomson & Son*, 1867, 6 M. 54.

<sup>12</sup> *Hogg v. Campbell*, 1864, 2 M. 1158; *M'Neill v. Campbell*, 1880, 7 R. 574; but see *Strachan v. Barlas*, 1894, 2 S.L.T. 59; *Fraser v. Fraser's Trs.*, 1897, 4 S.L.T. 228; cf. *Devlin v. Spinelli*, 1906, 14 S.L.T. 9.

<sup>13</sup> *Livingston v. Murray*, 1831, 9 S. 757.

<sup>14</sup> *Gavin v. Montgomerie*, 1830, 9 S. 213.

<sup>15</sup> *Thomson's Trs. v. Clark*, 1823, 2 S. 262 (N.E. 233); *Clark v. Spence*, 1824, 3 Murray, 450, at p. 455.

by or against the defenders, not including actions for payment of ordinary debts due to or by the defenders,<sup>1</sup> have been held not to be recoverable. It was held not competent to insist for production *in modum probationis* of private plans belonging to one of the parties to a cause, but diligence was granted for recovery of judicial plans.<sup>2</sup> Where the trustees of a person deceased took possession of all the papers found in her house, including those belonging to a niece, and refused to deliver up the niece's papers, on the ground that they tended to establish that she and her brother had fraudulently induced the deceased to make a will in their favour, the Court appointed a commissioner to inventory the niece's papers before delivering them to her.<sup>3</sup> Where the documents to be produced are of a bulky nature, or where the owner would be put to great inconvenience by their removal, or where the "call" covers only certain entries, the practice is to ask for production in order that excerpts may be taken, so as to protect private entries, or trade secrets, from disclosure.<sup>4</sup> Where the haver produced all the documents, and the commissioner declined to give an undertaking that he would not allow the defenders access to the books outwith the presence of the pursuers, the haver locked them up until the Court should have determined the question, and he was held justified in so doing.<sup>5</sup>

### (iii) Confidentiality.

1306. The plea of confidentiality as a bar to the production of documents may be taken either when application for commission and diligence is made, or before the commissioner. The Court will not (except in cases of fraud, etc. (see *infra*)) grant a diligence for the recovery of documents which are obviously confidential; yet there are many cases where the question of confidentiality does not arise when the diligence is granted, and it has to be decided by the commissioner, and if his decision is challenged, his duty is to seal the document up and allow the matter to be decided by the Court or Lord Ordinary.<sup>6</sup> It is the duty of the commissioner to apply his mind to the question, not merely to leave it to the Court.<sup>7</sup> The question of what are confidential communications is not dealt with in detail here (see CONFIDENTIAL COMMUNICATIONS), although the question arises when treating of the classes of documents which may and may not be recovered. An interlocutor granting diligence need not contain an express reservation in respect of confidential documents. It is implied.<sup>8</sup>

<sup>1</sup> *Adie v. Western Bank*, 1864, 2 M. 809.

<sup>2</sup> *Ferrier v. Young*, 1827, 5 S. 332.

<sup>3</sup> *Orrok v. Gordon*, 1847, 10 D. 35.

<sup>4</sup> *Dickson*, Evidence, s. 1318; *Paul v. Cadell*, 1799, 4 Pat. App. 89; *Graham v. Sprat*, 1847, 9 D. 545; *Adie v. Western Bank*, *supra*; *North British Ry. Co. v. Garroway*, 1893, 20 R. 397.

<sup>5</sup> *Cassils & Co. v. Absalon*, 1907, 15 S.L.T. 48.

<sup>6</sup> *Munro v. Fraser*, 1858, 21 D. 103, at p. 106.

<sup>7</sup> *Stewart, Govan & Co. v. Birrell*, 1897, 5 S.L.T. 174.

<sup>8</sup> *M'Donald v. M'Donald*, 1844, 6 D. 954.



(iv) *Where Fraud Averred.*

**1307.** Actions based upon fraud form an exceptional class in the matter of the recovery of documents. In the first place, wider and more comprehensive “calls” are allowed. In cases where fraud has been specifically averred, *e.g.* by a shareholder in a bank against the directors, a general diligence has been granted.<sup>1</sup> In an action of damages for wrongful detention on a charge of smuggling, the ship’s books and papers were recovered in order to throw light upon the whole history of the ship and the profits which she had earned.<sup>2</sup>

In the second place, the plea of confidentiality will not excuse the production of documents in such cases. While the diary of a living person is not, in general, recoverable, exception has been made in the case of a person accused of fraud, the state of his mind having been put in issue, and being ascertainable by his writings at the date of the acts alleged.<sup>3</sup> Assimilated to actions on fraud in this matter would seem to be actions to recover expenses of another process on the ground that the defender was the true *dominus litis* therein. In one such case a very wide diligence was allowed, and the recovery of correspondence of an undoubtedly confidential character, passing between parties and agents and counsel on the same side, was allowed.<sup>4</sup>

SUBSECTION (2).—*Objections on Ground of Public Interest.*(i) *Public Interest Generally.*

**1308.** Certain rules of practice have been laid down with regard to the recovery of documents in the hands of public officials. The question of the production or retention of such documents may arise either when application is made, or in the execution of the commission and by way of appeal from a commissioner’s decision, but the principles applied are the same. The Court will almost invariably accept the assurance of the head of a Government department as to whether the production of a document is contrary to public interest, will not consider whether the objection is well founded or not, and will in general act upon that assurance, even in a case between the department and a member of the public.<sup>5</sup> The Court, however, has power to order production and will exercise it in exceptional cases.<sup>6</sup>

(ii) *Registered Deeds and Public Documents.*

**1309.** Production of the originals of registered deeds will not, however, be ordered. Extracts are sufficient production. If the deed is required

<sup>1</sup> *McCowan v. Wright*, 1852, 15 D. 229; *Tulloch v. Davidson’s Exrs.*, 1858, 20 D. 1319; *Dobbie v. Johnston*, 1860, 22 D. 1113; *Assets Co., Ltd. v. Shirres’ Trs.*, 1897, 24 R. 418; cf. *MacLeod v. Marshall*, 1891, 28 S.L.R. 865.

<sup>2</sup> *Van Engers, Roeclofs & Co. v. Ellis Hughes*, 1898, 6 S.L.T. 90.

<sup>3</sup> *Strachan v. Barlas*, 1894, 2 S.L.T. 59.

<sup>4</sup> *Fraser v. Malloch*, 1895, 3 S.L.T. 211.

<sup>5</sup> *Admiralty v. Aberdeen Steam Trawling, etc., Co., Ltd.*, 1909 S.C. 335; *Forrest v. Macgregor*, 1913, 1 S.L.T. 372.

<sup>6</sup> *Henderson v. McGown*, 1916 S.C. 821.



for the purpose of being shewn to witnesses in the course of precognition, the originals will be exhibited at the Register House. Where it is necessary to refer to the original deeds at the proof or trial, they will be brought to the diet and exhibited by a Register House official.<sup>1</sup> Diligence will not be granted to recover public documents in a foreign country, such as books of record or instruments in public custody. The proper course is to call the custodian as a witness and to examine him as to the entries,<sup>2</sup> unless, perhaps, when the law of that country provides for officially certified extracts. The Court has refused a diligence to recover documents lodged in the office of the Court of Chancery in England, but granted a recommendation to that Court to allow the parties access to the documents.<sup>3</sup> The notes of evidence given at a fatal accidents inquiry may be recovered by an order of the Court, not by diligence.<sup>4</sup> The report of a bankrupt's statutory examination, however, may be recovered by diligence.<sup>5</sup>

(iii) *Police and Public Prosecutors.*

**1310.** The recovery of police reports has been refused in actions arising out of street accidents.<sup>6</sup> So also have reports by a police inspector or constable to the procurator-fiscal,<sup>7</sup> and the charge books, records, and notes kept by a procurator-fiscal.<sup>8</sup> In an action of damages for a malicious charge of perjury, the pursuer was allowed to recover a written information given by the defender to the procurator-fiscal, in respect that the Lord Advocate did not state that the recovery was contrary to public interest. The defender was held not entitled to plead the public interest.<sup>9</sup> Where a defender in a similar case pleaded that the information was given by him at the instance of his employers, diligence was granted under reservation of any objections to be taken before the commissioner.<sup>10</sup> In spite of the opposition of the Lord Advocate, a report by a procurator-fiscal to a county council was allowed to be recovered, the commissioner being directed to seal up the report to lie *in retentis* to await the orders of the Court.<sup>11</sup> Crown precognitions will not, in general, be recoverable.<sup>12</sup> But where the defender, in an action of damages for making a criminal charge maliciously and without probable cause, had lodged certain documents, including precognitions, with the procurator-fiscal, the Court granted diligence to the pursuer

<sup>1</sup> *Maclean v. Maclean's Trs.*, 1861, 23 D. 1262.

<sup>2</sup> *Maitland v. Maitland*, 1885, 12 R. 899.

<sup>3</sup> *Richardson v. Forbes' Trs.*, 1850, 22 Sc. Jur. 431.

<sup>4</sup> *Brown v. Glenboig Union Fireclay Co., Ltd.*, 1911, 1 S.L.T. 27.

<sup>5</sup> *Emslie v. Alexander*, 1862, 1 M. 209; *Low v. Low's Trs.*, 1907, 15 S.L.T. 330, per Lord Kinneir at p. 332.

<sup>6</sup> *Muir v. Edinburgh and District Tramways Co., Ltd.*, 1909 S.C. 244.

<sup>7</sup> *Hastings v. Chalmers*, 1890, 18 R. 244; *Campbell v. Gibson Maitland*, 1893, 1 S.L.T.

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<sup>8</sup> *Sheridan v. Peel*, 1907 S.C. 577.

<sup>9</sup> *Henderson v. Robertson*, 1853, 15 D. 292.

<sup>10</sup> *Forbes v. Gracie*, 1901, 9 S.L.T. 217. <sup>11</sup> *Halcrow v. Shearer*, 1892, 20 R. 216.

<sup>12</sup> *Donald v. Hart*, 1844, 6 D. 1255; *Arthur v. Lindsay*, 1895, 22 R. 417; *Sheridan v. Peel*, *supra*.

for recovery of the precognitions, no objection being stated by the Lord Advocate.<sup>1</sup> Communications between a private detective and his employers,<sup>2</sup> and also between a police constable and Dock Commissioners who paid for his services,<sup>3</sup> have been allowed to be recovered, there being in such cases no question of public interest.

(iv) *Inland Revenue, etc.*

**1311.** Recovery has been refused of instructions issued by the Inland Revenue to their officers,<sup>4</sup> letters written to the Inland Revenue by an informer,<sup>5</sup> documents produced by him,<sup>6</sup> and income tax returns when objected to by the Inland Revenue.<sup>7</sup> So also objection by the Estate Duty Office to produce the inventory of a deceased's estate has been sustained.<sup>8</sup>

(v) *Miscellaneous Examples.*

**1312.** Reports of a Government Inspector of Schools,<sup>9</sup> of the doctor of a lunatic asylum to the Board of Lunacy,<sup>10</sup> by a naval officer to his senior officer or the commander-in-chief, after a collision,<sup>11</sup> are not recoverable. On the ground, not of confidentiality but that, in the circumstances of the case, to grant it would impose an intolerable burden on the department, a diligence to recover telegrams and postal orders from the Post Office was refused.<sup>12</sup> Where, however, a Post Office representative, cited by the pursuer as a haver to produce excerpts, taken under the Bankers' Books Evidence Act, 1879,<sup>13</sup> from the Post Office Savings Bank books, objected to produce on the ground of confidentiality, the Court ordered production.<sup>14</sup> A collector of cess was held bound to exhibit his public records to allow the taking of excerpts, and bound to certify the authenticity of the excerpts.<sup>15</sup>

SUBSECTION (3).—*Recovery in Particular Types of Action.*

(i) *Actions of Reduction.*

**1313.** In actions for reduction of wills on the ground of insanity or of facility and circumvention, diligence has been refused for the recovery

<sup>1</sup> *Mills v. Kelvin & James White, Ltd.*, 1912 S.C. 995.

<sup>2</sup> *Macfarlane v. Macfarlane*, 1896, 4 S.L.T. 28; *Thomson v. Thomson*, 1907, 14 S.L.T. 643.

<sup>3</sup> *Ritchie v. Leith Dock Comrs.*, 1902, 10 S.L.T. 395.

<sup>4</sup> *Tierney v. Ballingall & Son*, 1896, 23 R. 512.

<sup>5</sup> *Brown's Trs. v. Inland Revenue*, 1897, 35 S.L.R. 340.

<sup>6</sup> *Brown v. Hay*, 1897, 5 S.L.T. 149.

<sup>7</sup> *Dunlop v. Scottish North-Eastern Rly. Co.*, 1866, 1 S.L.R. 102; *Shaw v. Kay*, 1904, 12 S.L.T. 495.

<sup>8</sup> *Forrest v. Macgregor*, 1913, 1 S.L.T. 372.

<sup>9</sup> *Sturrock v. Greig*, 1849, 12 D. 166; cf. *Gibson v. Caledonian Rly. Co.*, 1896, 33 S.L.R. 638.

<sup>10</sup> *Purves v. Gilchrist*, 1905, 13 S.L.T. 460.

<sup>11</sup> *Admiralty v. Aberdeen Steam Trawling, etc., Co., Ltd.*, 1909, S.C. 335.

<sup>12</sup> *Somervell v. Somervell*, 1900, 8 S.L.T. 112.

<sup>13</sup> 42 Vict. c. 11.

<sup>14</sup> *Forrest v. Macgregor*, *supra*.

<sup>15</sup> *Mackintosh v. Grant*, 1829, 8 S. 184.

of the diary of a body-servant containing entries relating to the state of health and mind of the testator, the servant being alive.<sup>1</sup> Motion for recovery of the diary of a probable witness has been refused, on the ground that it was not evidence until spoken to by her, and that she could, when being cited, be notified to bring the diary with her to the trial.<sup>2</sup> (It is a question whether the diary of a deceased person is admissible as evidence.<sup>2</sup> It has been rejected as evidence against an accused person.<sup>3</sup>) It is different where the diary is that of a person accused of fraud, and where his state of mind is put in issue,<sup>4</sup> or in the case of records kept by a doctor tending to shew the health and condition, mentally and bodily, of his patient.<sup>5</sup>

(ii) *Maritime Causes.*

**1314.** In maritime collision cases it is settled that *de recenti* reports by the master of a vessel to the owners may be recovered by the opposite party although they are not evidence against the owner; but the rule does not extend to any reports not made *de recenti*, or made in view of controversy or probable litigation as to liability for the collision.<sup>6</sup> A ship's log may be recovered in order to contradict the master and mate, and as evidence against the ship and those who keep the log.<sup>7</sup>

(iii) *Actions of Damages where Amount in Question.*

**1315.** In actions of damages there are certain classes of documents recoverable with a view of shewing the amount of damage suffered. Thus in actions for breach of promise of marriage, if there is no substantial divergence between the parties as to the defender's financial position, diligence to recover his business and bank books may be refused;<sup>8</sup> but if averments on that subject are made by the pursuer and not admitted by the defender, such recovery may be granted.<sup>9</sup> In an action for seduction, recovery of the defender's business books in order to ascertain his income will not be granted.<sup>10</sup> Where, with a view to minimising damages, and also on the merits, the defender, in an action of declarator of marriage with an alternative conclusion of damages for breach of promise and seduction, averred that the pursuer after the alleged seduction became engaged to another man, letters, etc., tending

<sup>1</sup> *M'Neill v. Campbell*, 1880, 7 R. 574.

<sup>2</sup> *Hogg v. Campbell*, 1864, 2 M. 1158.

<sup>3</sup> *Madeleine Smith*, 1857, 2 Irv. 641, 647, 662. <sup>4</sup> *Strachan v. Barlas*, 1894, 2 S.L.T. 59.

<sup>5</sup> *Henderson v. Hedrich*, 1892, 20 R. 95; *Fraser v. Fraser's Trs.*, 1897, 4 S.L.T. 228;

cf. *Livingstone v. Dinwoodie*, 1860, 22 D. 1333.

<sup>6</sup> *Admiralty v. Aberdeen Steam, etc., Fishing Co., Ltd.*, 1909 S.C. 335; *Scott v. Portsoy Harbour Co.*, 1900, 8 S.L.T. 38.

<sup>7</sup> *The "Talisman" v. The "Tyne"*, 1896, 4 S.L.T. 63 (and English cases there cited); *Burnyeat v. The City Line, Ltd.*, 1896, 4 S.L.T. 284; cf. *Livingstone v. Dinwoodie*, *supra*.

<sup>8</sup> *Somerville v. Thomson*, 1896, 23 R. 576.

<sup>9</sup> *Brodie v. M'Gregor*, 1900, 8 S.L.T. 200; *Strojan v. M'Whirter*, 1901, 9 S.L.T. 242; *Robertson v. Hamilton*, 1915, 2 S.L.T. 195.

<sup>10</sup> *A. v. B.*, 1875, 12 S.L.R. 621.



to shew this were allowed to be recovered.<sup>1</sup> In actions of damages for personal injury the defender may be allowed to recover the pursuer's books for a period of years past for the purpose of testing the pursuer's averment as to the financial loss resulting from the injury.<sup>2</sup> A similar rule applies in actions of defamation.<sup>3</sup> Along with the business books there may be included in the "call" receipts for income tax, where the income of a party is a relevant subject for inquiry.<sup>4</sup> When the diligence extends over too long a period, recovery of income tax receipts will be refused.<sup>5</sup> Income tax returns, however, when production is objected to by the Inland Revenue, are not recoverable.<sup>6</sup> When a pursuer alleged that his credit had suffered owing to a decree having been wrongfully taken out against him, his books were held to be recoverable.<sup>7</sup>

(iv) *Slander Actions.*

**1316.** In actions for defamation, a pursuer may before the closing of the record recover the defamatory writing which is the ground of action.<sup>8</sup> When suing a newspaper proprietor for a defamatory statement contained in the newspaper, a pursuer has been allowed to recover excerpts from the defender's books for the purpose of shewing "the average daily circulation" of the paper.<sup>9</sup> Where the purpose of a similar application was to shew the number of copies containing the slander sent to Birmingham, the diligence was refused, there being no averment on which to found it.<sup>10</sup> Where the newspaper undertakes responsibility for slander contained in an anonymous letter, diligence to recover the original letter will not be granted<sup>11</sup> unless where the pursuer has averred that the letter was really written in the newspaper office as part of a deliberate plot to injure him by a series of defamatory letters.<sup>12</sup> Where a pursuer avers malice in the report of a political meeting, he may recover the materials from which the report was printed, communications between the defenders and their local correspondents, and communications to the defenders from members of the public.<sup>13</sup> A defender cannot recover

<sup>1</sup> *Walker v. Walker*, 1896, 4 S.L.T. 151.

<sup>2</sup> *Bain v. Caledonian Rly. Co.*, 1902, 10 S.L.T. 56; cf. *Craig v. North British Rly. Co.*, 1888, 15 R. 808; *Johnston v. Caledonian Rly. Co.*, 1892, 20 R. 222.

<sup>3</sup> *Aitchison & Sons, Ltd. v. M'Ewan*, 1903, 5 F. 303; *Gray v. Wyllie*, 1904, 6 F. 448.

<sup>4</sup> *Johnston*, *supra*; *Stroyan v. M'Whirter*, *supra*; *Macdonald v. Hedderwick & Sons*, 1901, 3 F. 674; *Irvine v. Glasgow and South-Western Rly. Co.*, 1913, 2 S.L.T. 452; cf. *Christie v. Craik*, 1900, 2 F. 1287; *Gray*, *supra*; *Keir v. Outram & Co., Ltd.*, 1913, 51 S.L.R. 8.

<sup>5</sup> *Craig*, *supra*; *Christie*, *supra*.

<sup>6</sup> *Dunlop v. Scottish North-Eastern Rly. Co.*, 1866, 1 S.L.R. 102; *Shaw v. Kay*, 1904, 12 S.L.T. 495.

<sup>7</sup> *Rhind v. Kemp & Co.*, 1894, 1 S.L.T. 434.

<sup>8</sup> *Graeme-Hunter v. Glasgow Iron and Steel Co., Ltd.*, 1908, 16 S.L.T. 15.

<sup>9</sup> *Macdonald v. Hedderwick & Sons*, 1901, 3 F. 674.

<sup>10</sup> *British Publishing Co. v. Hedderwick & Sons*, 1892, 19 R. 1008.

<sup>11</sup> *Lowe v. Taylor*, 1843, 5 D. 1261; *Brims v. Reid & Sons*, 1885, 12 R. 1016; *Morrison v. Smith & Co.*, 1897, 24 R. 471.

<sup>12</sup> *Cunningham v. Duncan & Jamieson*, 1889, 16 R. 383; *Falconer v. Docharty*, 1893, 1 S.L.T. 96; *Greig v. John Balfour & Co.*, 1897, 5 S.L.T. 175.

<sup>13</sup> *Reid v. Johnston & Co.*, 1912 S.C. 187.



documents, which could not be admitted as evidence at the trial, to enable him to consider whether he could plead *veritas* successfully.<sup>1</sup>

SUBSECTION (4).—*Communications between Persons in Certain Legal Relationships.*

(i) *Master and Servant.*

1317. Subject to exceptional circumstances,<sup>2</sup> and provided that the letter or report is not written after the action was commenced or contemplated,<sup>3</sup> the general rule is that letters and reports from an employee to his employers regarding an accident or other happening, and referring to details which might be forgotten, are recoverable.<sup>4</sup> Nothing in the nature of precognition in a report can be recovered,<sup>5</sup> but it is no objection that the report contains the names of persons who may be witnesses.<sup>6</sup> Communications by the employers in reply to such letters or reports cannot be recovered, however.<sup>7</sup>

(ii) *Agent and Client.*

1318. Communications with reference to the subject-matter of an action commenced or contemplated cannot in general be recovered,<sup>8</sup> whether between parties and their counsel or agents,<sup>9</sup> or between parties on the same side.<sup>10</sup> Where, however, the client has been sequestered,<sup>11</sup> or is relevantly accused of fraud,<sup>12</sup> recovery will be granted. Law agents and attorneys cited as havers may be bound to answer such interrogatories touching writings that have come to their knowledge in the course of their employment, as might competently be put to their clients, and to produce such documents as their clients might be obliged to produce.<sup>13</sup> Where an agent is employed to contract with third parties,

<sup>1</sup> *William M'Kinnon & Co. v. Whitelaw*, 1919, 1 S.L.T. 304.

<sup>2</sup> *Northern Garage, Ltd. v. North British Motor Manufacturing Co., Ltd.*, 1908, 16 S.L.T. 573.

<sup>3</sup> *Admiralty v. Aberdeen Steam, etc., Fishing Co., Ltd.*, 1909 S.C. 335; *Whitehill v. Corporation of Glasgow*, 1915 S.C. 1015.

<sup>4</sup> *Tannett, Walker & Co. v. Hannay & Sons*, 1873, 11 M. 931; *M'Laren v. Caledonian Rly. Co.*, 1893, 1 S.L.T. 42; *Scott v. Portsoy Harbour Co.*, 1900, 8 S.L.T. 38; *Sutherland v. John Ritchie & Co.*, 1900, 8 S.L.T. 100; *Admiralty*, *supra*; *Irvine v. Glasgow and South-Western Rly. Co.*, 1913, 2 S.L.T. 452; *Whitehill*, *supra*.

<sup>5</sup> *Whitehill*, *supra*.

<sup>6</sup> *Whitehill*, *supra*; *Macphee v. Corporation of Glasgow*, 1915 S.C. 990.

<sup>7</sup> *MacKinnon v. National Steamship Co.*, 1904, 12 S.L.T. 411; *Devlin v. Spinelli*, 1906, 14 S.L.T. 9.

<sup>8</sup> *Lady Bath's Exrs. v. Johnston*, 12th November 1811, F.C.; *Lumsdaine v. Balfour*, 1828, 7 S. 7; *Jarnis v. Anderson*, 1841, 3 D. 990.

<sup>9</sup> *Stein v. Marshall*, 1804, Mor. 12443; *Thomson's Trs. v. Clark*, 1823, 2 S. 262; *Munro v. Fraser*, 1858, 21 D. 103.

<sup>10</sup> *Rose v. Medical Invalid Insurance Society*, 1847, 10 D. 156; *Tannett, Walker & Co. v. Hannay & Sons*, *supra*; *Pearson v. Anderson Bros.*, 1897, 5 S.L.T. 177.

<sup>11</sup> Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), ss. 86, 87; *A. B. v. Binny*, 1858, 20 D. 1058; *Tod's Tr. v. Officer*, 1872, 10 M. 980.

<sup>12</sup> *Inglis v. Gardner*, 1843, 5 D. 1029; *Millar v. Small*, 1856, 19 D. 142.

<sup>13</sup> *Scott v. Napier*, 1749, 1 Pat. App. 441; see also *Campbell v. Campbell*, 1823, 2 S. 139 (N.E. 128); *Fisher v. Bontine*, 1827, 6 S. 330.

communications between agent and client are recoverable to prove the agent's authority, even when it relates to the compromise of an action.<sup>1</sup> A pursuer has been allowed to recover correspondence passing between the defenders and their agents, for the purpose of proving that his claim had been intimated to the defenders and that they knew of it prior to the institution of a counter-action.<sup>2</sup> In an action by a railway company against a quarrymaster as to whether freestone was a mineral, the respondents stated that the complainers had treated and regarded freestone as a mineral in claims and arbitration proceedings, sixty years before, between them and the proprietors from whom they acquired the lands, and were allowed to recover, under express reservation of questions of confidentiality, to be determined by the Lord Ordinary, letters from the complainers' law agents to arbiters, inquirers, contractors, and officials employed by complainers in the arbitration, and entries in the business books of the complainers' law agents referring to the same transactions, tending to shew whether the complainers regarded the freestone as a mineral or otherwise.<sup>3</sup>

(iii) *Reports by Persons Employed (not Servants).*

**1319.** Correspondence with an engineer, and a report prepared by him with reference to the subject of a contemplated action, have been held not recoverable.<sup>4</sup> Communications between an insurance company and its agent with regard to the insurable interest of an insured are not recoverable,<sup>5</sup> but where the company averred in defence that pursuers had failed to prove the age of an insured person, the medical reports made to the company at the date of the contract were allowed to be recovered.<sup>6</sup> Medical reports may in general be recovered,<sup>7</sup> although they have been made in confidence. If the recovery, however, were for a purpose adverse to the patient's interest, it might not be granted.<sup>8</sup>

SUBSECTION (5).—*Miscellaneous.*

(i) *Title Deeds.*

**1320.** A party is not entitled to ransack his opponent's charter chest.<sup>9</sup> In order to warrant a recovery of title deeds, a special case must be

<sup>1</sup> *Lumsdaine v. Balfour*, *supra*; *Jaffray v. Simpson*, 1835, 13 S. 1122; *Kid v. Bunyan*, 1842, 5 D. 193.

<sup>2</sup> *Anderson v. Lord Elgin's Trs.*, 1859, 21 D. 654.

<sup>3</sup> *Caledonian Rly. Co. v. Symington*, 1913 S.C. 885.

<sup>4</sup> *Wark v. Bargaddie Coal Co.*, 1855, 17 D. 526; *affd.* 1859, 21 D. (H.L.) 1.

<sup>5</sup> *Simcock v. Scottish Imperial Insurance Co.*, 1901, 9 S.L.T. 234.

<sup>6</sup> *Elder v. English and Scottish Law Life Assurance Co.*, 1881, 19 S.L.R. 195; but see *Hope's Trs. v. Scottish Accident Insurance Co.*, 1895, 3 S.L.T. 164; *Macdonald v. New York Life Insurance Co.*, 1903, 11 S.L.T. 120.

<sup>7</sup> *M'Donald v. M'Donalds*, 1881, 8 R. 357; *Kinloch v. Irvine*, 1884, 21 S.L.R. 685; *Henderson v. Hedrich*, 1892, 20 R. 95.

<sup>8</sup> *M'Donald*, *supra*, per Lord Fraser at p. 359.

<sup>9</sup> *Scott v. Napier*, *supra*; *Pattinson v. Robertson*, 1844, 6 D. 944; *Greig v. Crosbie*, 1855, 13 D. 193; *Earl of Lauderdale v. Scrymgeour Wedderburn*, 1905, 7 F. 1045, per Lord Pres. Kinross and Lord M'Laren.

stated, or point made, and that with reference to special documents.<sup>1</sup> But where the call was made to support a claim, not to lands, but to a dignity, it was allowed on being limited to documents which were historical documents and not documents of title.<sup>2</sup> A third party's title deeds cannot, in general, be recovered under a diligence.<sup>3</sup>

(ii) *Railway Rate Cases.*

**1321.** In a complaint to the Railway and Canal Commission as to an increase in the rates applicable to carriage of coal, a railway company, respondents, were refused a diligence to recover the business books of the complainers for a period of years prior to the application, on the ground that the reasonableness or otherwise of the company's rates was not to be measured by their effect upon the complainers' trade, and the refusal was affirmed by the Court.<sup>4</sup> Where, however, defenders in an action by a railway company for freight averred that they had been charged higher rates than those exacted by the pursuers or two other railway companies from rival traders, they obtained a diligence in restricted terms for recovery of certain books and documents in the hands of these two companies and the rival traders, none of whom were parties to the action.<sup>5</sup>

(iii) *Bankers' Books.*

**1322.** Under the Bankers' Books Evidence Act, 1879,<sup>6</sup> a bank official cannot be compelled, in any action to which the bank is not a party, to produce books or appear as a witness to prove the accounts, unless by special order of the judge.<sup>7</sup> A party to an action may, upon giving three days' notice to the bank, obtain an order to inspect and take copies of entries in the books.<sup>8</sup> Such copy, certified in manner provided by the Act, is *prima facie* evidence of the entry.<sup>9</sup> The procedure provided by the statute is, however, seldom resorted to. Entries in bankers' books are frequently included in a specification of documents, and on diligence being granted, the bank supplies excerpts which parties accept.

SECTION 5.—PROCEDURE IN COMMISSIONS FOR THE RECOVERY OF DOCUMENTS.

**1323.** The procedure in obtaining and executing commissions for the recovery of documents is substantially the same as that which is followed in commissions for taking the evidence of witnesses. There are, however, differences and specialties, mainly arising from the dis-

<sup>1</sup> *Cairncross v. Heally*, 1765, 5 Brown's Supplement, p. 912; *Riggs v. Drummond*, 1861, 23 D. 1251; *Richardson v. Fleming*, 1867, 5 M. 586, per Lord Justice-Clerk Patton at p. 589.

<sup>2</sup> *Earl of Lauderdale v. Scrymgeour Wedderburn*, 1904, 7 F. 1045.

<sup>3</sup> *Fisher v. Bontine*, 1827, 6 S. 330; *Riggs v. Drummond*, *supra*.

<sup>4</sup> *John Watson, Ltd. v. Caledonian Rly. Co.*, 1901, 3 F. 791.

<sup>5</sup> *North British Rly. Co. v. Garraway*, 1893, 20 R. 397.

<sup>6</sup> 42 Vict. c. 11.

<sup>7</sup> *Ibid.*, s. 6.

<sup>8</sup> *Ibid.*, s. 7.

<sup>9</sup> *Ibid.*, ss. 3-5.



inction between oral and documentary evidence, between witnesses to fact and havers of documents, and from the fact that documents recovered may or may not be evidence in the cause.

#### SUBSECTION (1).—*Application.*

**1324.** In the rare cases where application is made before the summons is called, it is thought that, on the analogy of commissions to take evidence to lie *in retentis*, the procedure should be by petition to the Inner House. In one case, however, where the summons, though not called, had been executed, the Lord Ordinary, before whom it was intended to call the action, granted commission.<sup>1</sup> After the dependence of the action, application is by motion, or note, to the Lord Ordinary or Division respectively, before whom it depends. The specification of documents is lodged in process, and the motion intimated to the opposite party. The motion may be made on any sederunt day or at a vacation Court.<sup>2</sup> It must be made timeously, or it will not be granted even for documents undoubtedly capable of being made evidence.<sup>3</sup> The opponent may resist all or any of the “calls” in the specification, but a third-party haver has no *locus* to oppose the grant. His remedy is to refuse to produce before the commissioner, and if the matter comes before the Court by way either of appeal from the commissioner’s decision in his favour, or on a motion for an order to produce, he may then appear by counsel. The contentions of the parties as to the proper scope of the specification are made at the Bar, and the diligence may be granted or refused, or granted in part and refused in part.

#### SUBSECTION (2).—*Interlocutor.*

**1325.** The interlocutor grants diligence against havers at the instance of the applicant for recovery of the documents called for in the specification (as amended, if disallowances have been made). In the case where some items are allowed and others disallowed, it is a wrong practice to grant the diligence in terms of a specification containing amendments by way of disallowance initialled by counsel at the Bar. The authentication of the alterations on the specification necessary to give effect to disallowances should be made by the Lord Ordinary or clerk of Court.<sup>4</sup> The point is of importance, in connection with reclaiming without leave, in order to distinguish the grant of a recovery from the refusal of it. The interlocutor then grants commission to a named person to take the oaths and examination of the havers, to be reported on or before a particular date or *quam primum*. Sometimes several commissioners are appointed to act, each at one of several specified places.

<sup>1</sup> *Braby & Co., Ltd. v. Story*, 1896, 3 S.L.T. 325.

<sup>2</sup> Court of Session Act, 1868 (31 & 32 Vict. c. 100), s. 93.

<sup>3</sup> *Murphy v. Clyde Navigation Trs.*, 1902, 4 F. 653.

<sup>4</sup> *Thomson & Co. v. Bowater & Sons*, 1918, S.C. 316, per Lord Johnston at pp. 319–320, Lord Mackenzie at p. 320.



SUBSECTION (3).—*Reclaiming.*

**1326.** A reclaiming note against an interlocutor of the Lord Ordinary granting commission and diligence for the recovery of documents is only competent with leave.<sup>1</sup> It is different, however, in the case of an interlocutor refusing a diligence in whole or in part, where the refusal is deemed to be an interlocutor refusing proof, and leave is not required.<sup>2</sup> In the former case the interlocutor may be reclaimed, with leave, within ten days from the date of the interlocutor taken to review.<sup>3</sup> In the latter case it would seem that, whether or not leave is granted, the reclaiming note should be presented within six days from the date of the interlocutor.<sup>4</sup>

SUBSECTION (4).—*Citation of Havers.*

**1327.** When a haver is cited he should be informed of the documents which he is to bring with him. This is commonly done by sending along with the citation a copy of the specification or of the relevant part of it. A pupil cannot be cited as a haver.<sup>5</sup> If he has a tutor, the latter should be cited.<sup>6</sup> If he has no tutor, it is a question whether the difficulty can be got over by the appointment of a curator *ad litem*.<sup>7</sup> A minor, however, may be cited and examined.<sup>8</sup> A husband may be examined for his wife, and an agent or clerk for a landed proprietor, partnership, or company, if there is no ground to suspect unwillingness or concealment on the part of the principal.<sup>9</sup> A peer must attend and depone, if cited.<sup>10</sup> If there is reason to presume that a haver will not attend, first and second diligence will be granted at the outset.<sup>11</sup> Letters of second diligence will not be granted against a haver who, though he obeys the citation, does not produce the documents.<sup>12</sup> The remedy is to obtain from the Lord Ordinary or Court an order upon the haver to produce the document, failure to obtemper which is dealt with as contempt of Court.

SUBSECTION (5).—*Havers Outwith the Jurisdiction.*

**1328.** Reference has been made above to the various statutes under which witnesses outwith Scotland may be compelled to attend before a commissioner appointed in pursuance of an order of the Court of Session, by recourse to the Courts of the jurisdiction within which the witness

<sup>1</sup> *Stewart v. Kennedy*, 1890, 17 R. 755; Court of Session Act, 1868 (31 & 32 Vict. c. 100), ss. 27, 28, and 54; A.S., 10th March 1870 (C.A.S., C, ii. 4).

<sup>2</sup> *Thomson & Co. v. Bowater & Sons*, 1918 S.C. 316.

<sup>3</sup> Court of Session Act, 1850 (13 & 14 Vict. c. 36), s. 11; Court of Session Act, 1868, s. 54.

<sup>4</sup> Court of Session Act, 1868, s. 28.

<sup>5</sup> *Aitken v. Hewat*, 1628, Mor. 8907.

<sup>6</sup> Fraser, Parent and Child, p. 218.

<sup>7</sup> Shand's Practice, p. 374; *Macdonald's Tr. v. Medhurst*, 1915 S.C. 879; cf. Fraser, Parent and Child, p. 219.

<sup>8</sup> *Earl of Marr v. His Vassals*, 1628, Mor. 8918.

<sup>9</sup> Mackay, Manual, p. 242.

<sup>10</sup> Dickson, Evidence, s. 1385.

<sup>11</sup> Shand's Practice, pp. 371, 372.

<sup>12</sup> *National Exchange Co. v. Drew & Dick*, 1858, 20 D. 837.

resides. There is, however, a question whether these statutes apply at all to the examination of havers who are not parties or witnesses in the cause. Under the Evidence by Commission Act, 1843,<sup>1</sup> the "production of any writings or documents" has been held by the Court of Appeal in England to be restricted to the production of documents by persons who are being examined before a commissioner as witnesses in the cause, and that there was no jurisdiction to make an order amounting to one for discovery against persons not parties to the action.<sup>2</sup> Since the wording of the Evidence by Commission Acts of 1859 and 1885<sup>3</sup> is in this respect the same, it would seem that the decision referred to would probably be applied not only in England, but also in Ireland, India, and the dominions and colonies. There is therefore apparently no means of compelling third-party havers outwith Scotland to appear.

#### SUBSECTION (6).—*Procedure at Diet of Examination.*

1329. The agents of parties usually attend,<sup>4</sup> but in important or complex cases the attendance of one counsel is justifiable.<sup>5</sup> The haver is sworn as a witness in ordinary form, and is then examined by the agent or counsel for the party who has obtained the diligence. As to what questions may be asked of havers, they "shall be obleidged to answer to all special pertenant interrogators, in relation to their haveing of the wrytes, or putting the same away, or as to their knowledge and suspicion, by whom the samen were taken away, or where they presently are, that the pursuar may thereby make discovery, and recover the same; Declaring always that upon advyseing of the defender's oath, they shall not be otherways decerned against, as havers of the saids wrytes, unless it be found, that they had the same since the citation, or fraudfully put them away at any time."<sup>6</sup>

1330. In modern practice the general rule is that the agent asks the haver what documents he has to produce under each article of the specification. The questions usually put are: Have you the documents called for? Have you had them since the date of citation? Have you ever had them? Have you put them away or destroyed them? If so, when, where, and why?<sup>7</sup> Do you know or suspect where the documents are now? Do you know who took the documents away? Questions as to the existence or non-existence of a document are proper, and the haver's deposition may be used as evidence of the fact.<sup>8</sup> It is incompetent to ask a haver whether he destroyed a document under instruc-

<sup>1</sup> 6 & 7 Vict. c. 82.

<sup>2</sup> *Burchard v. Macfarlane*, [1891] 2 Q.B. 241.

<sup>3</sup> 22 Vict. c. 20; 48 & 49 Vict. c. 74.

<sup>4</sup> *Fairley v. M'Gown*, 1836, 14 S. 470; *Craig v. Craig*, 1906, 14 S.L.T. 130.

<sup>5</sup> *Smith v. Murdoch*, 1829, 7 S. 777; *Gibb & M'Donald v. Baghott*, 1830, 2 Sc. Jur. 190; *Renton v. Hamilton*, 1846, 8 D. 1085; *Alison v. Blair Iron Co.*, 1856, 18 D. 851.

<sup>6</sup> A.S., 22nd February 1688.

<sup>7</sup> *Cullen v. Thomson & Kerr*, 1863, 1 M. 284; *Gordon v. Davidson*, 1865, 3 M. 938.

<sup>8</sup> *Boyd v. Anderson*, 1821, 1 S. 144 (N.E. 140); *Home v. Hardy*, 1842, 4 D. 1184; *Falconer v. Stephen*, 1849, 11 D. 1338.

tions from anyone, or who prepared the document.<sup>1</sup> No questions as to the contents of the documents,<sup>2</sup> or as to the merits of the cause,<sup>3</sup> are allowed. A haver may not excuse production by deponing that the documents called for will not benefit the party asking for them,<sup>4</sup> but he may state the objection that they are plainly irrelevant and have no bearing on the question at issue.<sup>5</sup> The haver must produce documents and answer proper questions, even if these infer injury to his character,<sup>6</sup> his private interests, or the interests of those he is representing,<sup>7</sup> but not if the fact put to him infers a criminal charge.<sup>8</sup> After the haver has been examined and has produced documents, the agent for the opposite party may question him so far as necessary to exhaust the diligence by the full and fair production of documents cross to those produced.<sup>9</sup>

**1331.** A haver may plead confidentiality. Although the Court will not (except where fraud is alleged) grant diligence for the recovery of obviously confidential documents, yet in many cases the question of the confidential nature of specific documents may not arise when the diligence is granted, and at that stage a haver who is not a party has no standing to object.<sup>10</sup> Where a haver pleads confidentiality he exhibits the document to the commissioner, not to the party pursuing the diligence, and the commissioner has to decide whether it is confidential or not.<sup>11</sup> If an appeal is taken or intimated from the commissioner's decision, he seals up the document, pending the decision of the Court.<sup>12</sup>

**1332.** When the diligence provides for the taking of excerpts, the books can only be seen by the party pursuing the diligence, with the consent of the haver. The haver is not obliged to make excerpts, nor is the pursuer bound to accept excerpts made by him. A haver who produces his business books is entitled to insist that they shall not be examined out-with his presence.<sup>13</sup> Failing agreement, the books are exhibited to the commissioner, who goes over them and directs his clerk as to what passages are to be excerpted, and afterwards compares the excerpts with the originals. This course is also appropriate where the interlocutor makes no provision for the taking of excerpts.

<sup>1</sup> *Cullen v. Thomson & Kerr*, 1863, 1 M. 284.      <sup>2</sup> *Somervell v. Somervell*, 1900, 8 S.L.T. 84.

<sup>3</sup> *Scott v. M'Gavin*, 1821, 2 Murray, 484, at p. 494; *Campbell v. Davidson*, 1827, 4 Murray, 171, at p. 178; *Dye v. Reid*, 1831, 9 S. 342; *Falconer v. Stephen*, 1849, 11 D. 1338; *Cullen v. Thomson & Kerr*, *supra*.

<sup>4</sup> *Lady Mary Campbell v. Earl of Crawford*, 1783, Mor. 3973.

<sup>5</sup> *Cunningham v. Duncan & Jamieson*, 1889, 16 R. 383; cf. *Lowe v. Taylor*, 5 D. 1261.

<sup>6</sup> *Murray v. Murray's Trs.*, 1744, Mor. 16752; *Don v. Don*, 1848, 10 D. 1046; *Somervell v. Somervell*, *supra*.

<sup>7</sup> *Graham v. Sprot*, 1847, 9 D. 545.

<sup>8</sup> *Murray v. Murray's Trs.*, *supra*; *Livingston v. Murrays*, 1830, 9 S. 161.

<sup>9</sup> *Dunlop's Trs. v. Lord Belhaven*, 1852, 14 D. 825; *Thorburn v. Hoby & Co.*, 1853, 15 D. 767.

<sup>10</sup> *Elder v. Black*, 1838, 16 S. 1183.

<sup>11</sup> *Stewart, Govan & Co. v. Birrell*, 1897, 5 S.L.T. 174.

<sup>12</sup> *Munro v. Fraser*, 1858, 21 D. 103, at p. 106; *County Council of Fife v. Thoms*, 1898, 25 R. 1097.

<sup>13</sup> *Cassils & Co. v. Absalon*, 1907, 15 S.L.T. 48.



**1333.** Drafts and copies should not be accepted instead of principal documents unless the latter cannot be recovered.<sup>1</sup> Where, however, the documents contained depositions and the draft alone was signed by the deponents, the minute-book and draft minute-book of a Kirk Session were allowed to be recovered.<sup>2</sup> Where also the question was whether a certain document had been issued as a prospectus, recovery of letter-books was allowed in order to obtain extracts of letters enclosing copies of the document, although it was not averred that the principal letters were lost or had been destroyed.<sup>3</sup>

**1334.** If the documents produced are not numerous they may be described in the deposition of the haver, which is taken down in writing or in shorthand. If numerous, they are mentioned in the deposition by number as per inventory. The documents and inventory are authenticated as relative to the deposition, the haver, commissioner, and clerk marking them, unless they would be injured by being marked, in which case their description should be enough to render their identity certain.

**1335.** A haver may insist on being paid his fee before producing.<sup>4</sup> He is entitled to a fee for attendance,<sup>5</sup> for searching out the documents,<sup>6</sup> and for copying extracts if requested to do so by the party executing the diligence, but not otherwise.<sup>7</sup> He may also refuse production until the party citing him has paid an account due to him.<sup>8</sup>

## PART IV.—COMMISSION AND DILIGENCE IN SHERIFF COURT PRACTICE.

### SECTION 1.—INTRODUCTORY.

**1336.** The Sheriff Courts Act, 1907,<sup>9</sup> repeals previous Sheriff Courts Acts and also “all laws, statutes, Acts of Sederunt, orders and usages now in force, so far as the same are inconsistent with the provisions of this Act.” The statute is intended to be a complete code of Sheriff Court procedure. Many of its rules, however, are stated permissively, e.g. “the Sheriff may . . .,” and there were many “usages” in existence before the Act which are not in terms abolished by it. It is therefore somewhat difficult to lay down precisely which of the former usages as regards commission and diligence are still competent and which are not. In general, in the absence of any limiting indication in the Act

<sup>1</sup> *Mann v. Smith*, 1861, 23 D. 683; *Caledonian Rly. Co. v. Symington*, 1912 S.C. 1033.

<sup>2</sup> *Sturrock v. Greig*, 1849, 12 D. 166.

<sup>3</sup> *Sleigh v. Glasgow and Transvaal Options, Ltd.*, 1903, 5 F. 332.

<sup>4</sup> *Forsyth v. Pringle Taylor & Lamond Lowson*, 1906, 14 S.L.T. 658.

<sup>5</sup> *Moreton v. Lockhart*, 1851, 13 D. 717; *Forsyth v. Pringle Taylor & Lamond Lowson*, *supra*.

<sup>6</sup> *Cuthbertson v. Elliott*, 1860, 22 D. 389; *MacKinnon v. Guildford*, 1894, 2 S.L.T. 309; *Forsyth*, *supra*.

<sup>7</sup> *Burden v. Leitch*, 1840, 2 D. 1380; *Forsyth*, *supra*.

<sup>8</sup> *MacKinnon v. Guildford*, *supra*.

<sup>9</sup> Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51), amended by Sheriff Courts (Scotland) Act, 1913 (2 & 3 Geo. V. c. 28)—hereinafter referred to as “Act.”



or its rules, it may be taken that the former practice will hold good, especially if it is in conformity with the practice of the Court of Session. The following paragraphs are intended merely to shew in what respects Sheriff Court practice need be considered, as distinct from Court of Session practice.

## SECTION 2.—COMMISSION TO TAKE THE EVIDENCE OF WITNESSES.

### SUBSECTION (1).—*To Lie in retentis.*

**1337.** “Evidence in danger of being lost may be taken to lie *in retentis*, and, if satisfied that it is desirable so to do, the Sheriff may, upon the motion of either party at any time, either take himself, or grant authority to a commissioner to take, such evidence.”<sup>1</sup> The usual grounds for granting commissions will be old age, dangerous illness, or that the witness is necessarily leaving Scotland. As the matter is in the Sheriff’s discretion, it is thought that he would be guided by the practice of the Court of Session, as above described.<sup>2</sup>

**1338.** The counterpart of the Court of Session procedure, by which it is possible to obtain commission before action is raised, by way of petition to the Inner House, is not known in the Sheriff Court, and it is thought that the initial writ in the action must be executed before application can be entertained.<sup>3</sup> Before defences are lodged application should be by minute, setting forth the names of the witnesses and the reason which endangers their evidence being lost.<sup>4</sup> Whether it is now necessary, since a condescendence is now annexed to the initial writ, to state the fact or facts upon which the witnesses are to be examined,<sup>5</sup> is doubtful, bearing in mind that the practice of requiring a condescendence of the facts is obsolete in the Court of Session.<sup>6</sup> Where defences have been lodged, a motion in the cause will, as a general rule, be sufficient.<sup>7</sup>

### SUBSECTION (2).—*After Allowance of Proof.*

**1339.** “The evidence of any witness (or haver) resident beyond the jurisdiction of the Court, or who although resident within the jurisdiction resides at some place remote from the seat of the Court, or who is by reason of illness, old age, or infirmity unable to attend the diet of proof or a jury trial, may be taken by commission in like manner as evidence to lie *in retentis*.”<sup>8</sup>

<sup>1</sup> Act, r. 63.

<sup>2</sup> Paras. 1249 to 1258, *supra*.

<sup>3</sup> Dove Wilson, Sheriff Court Practice, p. 276.

<sup>4</sup> Dove Wilson, p. 276; Lees, Sheriff Court Styles, pp. 527, 528; A.S., 10th July 1839, s. 73; Lewis, Sheriff Court Practice, pp. 99 (note), 486–487.

<sup>5</sup> See A.S., 10th July 1839, s. 73.

<sup>6</sup> Lees, p. 184, note (a); para. 1257, *supra*.

<sup>7</sup> Lewis, p. 99 (note).

<sup>8</sup> Act, r. 70.

(i) *Witnesses Resident beyond the Jurisdiction.*

**1340.** The matter is in the discretion of the Sheriff, and it is thought that, in spite of the wording of the rule, commissions will not as a rule be granted merely because the witness is furth of the territorial jurisdiction of a particular Sheriff Court, but rather where furth of Scotland or in an extremely remote part of Scotland. "Jurisdiction" as used here appears to mean the area within which the Court's warrant of citation will run, viz. Scotland. If the witness is furth of Scotland but within England or Northern Ireland, while there is no power, as there is in the Court of Session,<sup>1</sup> to enforce the attendance at a proof or trial in Scotland of such a witness, the provisions of the Evidence by Commission Acts, 1843 and 1859, may be invoked.<sup>2</sup> If the witness is in the Irish Free State or one of the dominions or colonies, the procedure is under the Evidence by Commission Acts, 1859 and 1885.<sup>3</sup> A party desiring the evidence of a witness in a foreign country can, by minute, obtain from the Sheriff a letter of request to a foreign tribunal to be transmitted through the Foreign Office.<sup>4</sup>

(ii) *Illness, Old Age, or Infirmary.*

**1341.** The decisions under the former statutes seem still to be applicable, to the effect that commissions are incompetent in all other cases than those provided for by the rule, and that no excuse, however satisfactory, and no considerations of convenience, however obvious, can, even with consent of parties, make such commissions competent.<sup>5</sup> Otherwise, as regards the above grounds of application, the considerations and conditions observed in Court of Session practice will apply. Moreover, the case of a witness about to leave the country is covered by Rule 63.<sup>6</sup>

## SECTION 3.—COMMISSIONS FOR THE RECOVERY OF DOCUMENTS.

SUBSECTION (1).—*Before Record Closed.*

**1342.** "Each party shall, along with his pleadings, or at latest before the closing of the record, if required by any other party in the action or by the Sheriff, lodge any documents founded upon in the pleadings, so far as the same are within his custody or power."<sup>7</sup> "Where such documents are not produced by either party, or where they are in the hands of third parties, the Sheriff may, on the motion of either party, grant commission and diligence for their recovery, and may on that account delay closing the record."<sup>8</sup>

<sup>1</sup> Attendance of Witnesses Act, 1854; see para. 1265, *supra*.

<sup>2</sup> See para. 1265, *supra*.

<sup>3</sup> See para. 1266, *supra*.

<sup>4</sup> See para. 1267, *supra*; C.A.S., L, ii.; Lewis, pp. 98, 359-61.

<sup>5</sup> *Byres v. Forbes*, 1866, 4 M. 388; *Steuart v. Grant*, 1867, 5 M. 736; Dove Wilson, p. 271; Wallace, Sheriff Court Practice, p. 280.

<sup>6</sup> Para. 1337, *supra*.

<sup>7</sup> Act, r. 47.

<sup>8</sup> Act, r. 48.

1343. The above rules refer only to documents founded upon in the pleadings. As regards other documents, there is in the statute no warrant for granting commission prior to proof being allowed. The practice in the Court of Session has allowed documents to be recovered before the closing of the record, on special cause shewn.<sup>1</sup> It will be noted that the Sheriff Court statutory rule is narrower. As a general rule, in the Court of Session the documents allowed to be recovered in such special cases are of the nature of documents founded upon, or at least such documents as are necessary to enable a party to make his averments distinct and specific. In some cases, however, the discretion exercised in the Court of Session has been wider, and a competent authority on Sheriff Court practice, writing prior to the Act of 1907, was of opinion that there was nothing to prevent a Sheriff from exercising such wider discretion in a proper case.<sup>2</sup>

#### SUBSECTION (2).—*After Proof Allowed.*

1344. "At any time after a proof has been allowed, or an order made for jury trial, the Sheriff, upon the motion of either party, may grant commission and diligence for the recovery of such documents as the Sheriff shall deem relevant to the cause."<sup>3</sup> The last qualification is not thought to alter the accepted rules of practice as to what documents can be recovered, nor to mean that the admissibility of the documents as evidence must be determined at the time of the application.<sup>4</sup> The diligence may be granted by a Sheriff in a petition for service.<sup>5</sup> The same considerations as in Court of Session practice will govern as regards the documents which may be recovered. It should be noted that the Court of Session rules which require documents to be lodged within a specified period of days before proofs and jury trials have no counterpart in the Sheriff Court, and there is nothing to prevent documents being recovered right up to the day of proof or trial. It is bad practice, however, to delay so long.

### SECTION 4.—PROCEDURE IN COMMISSIONS.

#### SUBSECTION (1).—*General.*

1345. There is no substantial difference between procedure in commissions in the Sheriff Court and Court of Session. The interlocutors are similar in form, and procedure at the dict of examination follows the same course. The same rules govern the use of the depositions at the proof or trial.<sup>6</sup> The following are the specialties arising in Sheriff Court procedure.

<sup>1</sup> See para. 1298, *supra*.

<sup>2</sup> Act, r. 62.

<sup>3</sup> *Irving's Trs. v. Irving*, 1894, 1 S.L.T. 665.

<sup>4</sup> Dove Wilson, p. 158.

<sup>5</sup> Lewis, p. 95; Wallace, p. 269.

<sup>6</sup> Act, r. 138.

SUBSECTION (2).—*Interrogatories.*

**1346.** Whereas in Court of Session commissions the examination was, until 1907, in use to be conducted upon interrogatories, and since that date interrogatories may be dispensed with, the practice in the Sheriff Court has been that interrogatories need not be adjusted, though, if the parties agree, they may be used. A suitable occasion for their use is when the commission is to be executed abroad, and there are no skilled lawyers available to examine the witnesses.

SUBSECTION (3).—*Commissioner.*

**1347.** The statute gives no directions as to the persons to be appointed. Under the former practice the commissioner might be a Sheriff, Sheriff-Clerk, legal practitioner of three years' standing, Justice of the Peace, or other magistrate, and this practice will probably be adhered to.<sup>1</sup>

SUBSECTION (4).—*Citation.*

**1348.** A certified copy of the interlocutor granting commission is a sufficient warrant for the citation of witnesses and havers to a diet of examination.<sup>2</sup> The warrant may now be executed, either by officer or by registered post, within the jurisdiction of any Sheriff, without being endorsed by the Sheriff-Clerk of that jurisdiction. The officer may be an officer of the jurisdiction in which the warrant was granted or in which it is to be executed.<sup>3</sup> Failure to appear, without reasonable excuse, after citation on a forty-eight hours' *induciae*, and a tender of travelling expenses, if demanded, renders the witness or haver liable to a penalty of forty shillings, payable to the party citing him.<sup>4</sup> Letters of second diligence (effectual in any sheriffdom with endorsation) may be granted, under pain of arrest and imprisonment, until caution be found for the witness's due attendance. Decree for expenses of such letters may be granted against the witness or haver.<sup>5</sup>

SUBSECTION (5).—*Expenses of Commission.*

**1349.** The expense of a commission, where necessary, is part of the expenses *in causa*.<sup>6</sup> The shorthand writer's fee is paid in the first instance by the party moving for the commission, whose agents are personally liable.<sup>7</sup> The agents are also personally liable for the fees of witnesses and havers.<sup>8</sup> The Sheriff may order payment, and in the case

<sup>1</sup> Lewis, p. 99.<sup>3</sup> Act, r. 10.<sup>5</sup> Act, r. 73.<sup>7</sup> Act, r. 67.<sup>2</sup> Act, r. 71.<sup>4</sup> Act, r. 71.<sup>6</sup> *Graham v. Borthwick*, 1875, 2 R. 812.<sup>8</sup> Act, r. 72.



of non-implement, may grant decree by default.<sup>1</sup> There is no statutory provision for the fees of the commissioner and clerk, and the Sheriff will fix these as he thinks reasonable. They are paid in the first instance by the party moving for the commission, and the commissioner need not give up his report until they are paid.

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<sup>1</sup> Act, r. 56.

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## COMMISSIONER.

*See* CHURCH; SEQUESTRATION.

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## COMMISSIONER OF POLICE.

*See* BURGH; POLICE.

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## COMMISSIONER OF JUSTICIARY.

*See* JUSTICIARY, HIGH COURT OF.

## COMMISSIONER OF LIGHT- HOUSES.

*See* LIGHTHOUSE.

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## COMMISSIONERS OF SUPPLY.

*See* COUNTY COUNCIL.

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## COMMISSIONERS OF TEINDS.

*See* TEINDS.

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## COMMITMENT FOR TRIAL.

*See* CRIME (PROCEDURE).

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## COMMIXTION.

*See* PROPERTY.

## COMMODATE.

*See* LOAN.

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## COMMON AGENT.

*See* MULTIPLEPOINDING; TEINDS.

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## COMMON CARRIER.

*See* CARRIAGE BY LAND; CARRIAGE BY SEA.

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## COMMON DEBTOR.

*See* ARRESTMENT.

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## COMMON EMPLOYMENT.

*See* MASTER AND SERVANT; NEGLIGENCE.

# COMMON GABLE.

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## SECTION 1.—INTRODUCTORY.

**1350.** When a gable is built partly on one stance and partly on another, and is of such a character that chimneys, fire-places, and other conveniences are or may be fitted into it on both sides, and the gable can be utilised as the gable of adjoining houses, it is known as a common, mutual, or mean gable. The word “common” has not in this connection the special legal significance belonging to it in the phrase “common property,” and if indicating a species of common property does so only in a very special sense.<sup>1</sup> The use of the word “mutual” as applied to a common gable is also open to objection; but the use of both words as denoting a particular kind of gable is of long standing and well established.

**1351.** Common gables differ in their nature from division walls, which are merely fences. The former originate in the custom of burghs or in consent express or implied; the erection of the latter may be compulsory in certain rural subjects in virtue of the Acts of 1661 and 1669. A division wall cannot be converted into a common gable without the consent of the neighbouring proprietors. “A mutual gable,” said Lord Deas, in *Lamont v. Cumming*,<sup>2</sup> “is a very peculiar kind of mutual wall—very different, for instance, from division walls, so common in this city [Edinburgh] between back greens; and it will not do to reason from the one to the other. The purpose of these division walls is enclosure merely, without excluding light and air. . . . A mutual gable must be presumed to be intended to serve the purposes of a gable for each of the properties, to bind into it the front and back walls of the houses, to receive the

<sup>1</sup> *Lamont v. Cumming*, 1875, 2 R. 784, per Lord President Inglis at p. 787.

<sup>2</sup> 1875, 2 R. 784, at p. 790.



chimneys and flues of each in fair proportion, and to afford supports essential to the interior construction and utility of each of the buildings.”

**1352.** The device of the common gable was known in ancient Rome (*parietes communes*) and has existed in Scotland for hundreds of years. It permits of economical continuous building on the street line, saves space, and promotes warmth in the houses. Though the device is of so long standing, it was not till the beginning of the nineteenth century that the first reported case occurred.<sup>1</sup>

## SECTION 2.—PRINCIPLES ON WHICH THE LAW OF COMMON GABLES RESTS.

**1353.** The chief difficulties in the law have been of a theoretical rather than of a practical nature. Thus, while the right of encroachment on a neighbour's ground for the purpose of building a gable, the right to prevent the neighbour from using it till he pays his share of the cost, and the obligation to allow such use on payment being made, have long been recognised, great diversity of opinion has existed as to the legal principles on which these rules are founded. The difficulties which surround the subject are indicated by Lord Justice-Clerk Moncreiff in *Robertson v. Scott*.<sup>2</sup> “It is in vain,” he says, “to try to reduce the customary or consuetudinary incident of urban building which from the necessity or at least the convenience of the situation has grown up in large towns in regard to mutual gables, to anything founded either upon feudal grant or ordinary contract. The right of the first builder of a gable intended to be a mutual gable is full of anomaly. It is one to build on his neighbour's ground without a title, and to become his neighbour's creditor without a contract. When the first feuar builds he is entitled under this customary law to build on his neighbour's ground. He has no title to his neighbour's ground according to the ordinary forms of conveyancing, and he never to the end acquires one. Nevertheless, the gable is his gable<sup>3</sup> until someone else acquires the right to it, and that again is not acquired by any writing or title, but simply by the fact of using the gable as a mutual gable and erecting the adjoining building in contact with and alongside of it. This is not a right, therefore, that can be reduced to feudal rules; but the substantial rights enjoyed by each of the adjacent proprietors in a mutual gable are well fixed.”

## SECTION 3.—THE RIGHT TO BUILD.

### SUBSECTION (1).—*Under Contract.*

**1354.** The rights and obligations of neighbouring feuars as to the building of and payment for common gables are frequently regulated

<sup>1</sup> *Wallace v. Brown*, 1808, Mor. App., Personal and Real, No. 4.

<sup>2</sup> 1886, 13 R. 1127.

<sup>3</sup> See, however, para. 1362, and *Robertson v. Scott*, 1886, 13 R. 1127. per Lord Rutherford Clark.

by their titles. Superiors often stipulate with their feuars that each feuar shall be entitled to encroach upon neighbouring feus, to a specified extent, for the erection of mutual gables; it is commonly also stipulated that the builder of the gable or gables is to have recourse for payment against the superior or against the neighbouring feuar, as the case may be; and the period for payment is sometimes added, *e.g.* when the neighbouring stance is feued, or when the gable is used. The agreement may also fix the amount of the payment or leave it to be assessed by valuation. Certain of the conditions of building may be incorporated with a feuing plan to which the feuars are taken bound to adhere. Illustrations of special contractual conditions will be found in the cases cited.<sup>1</sup>

#### SUBSECTION (2).—*Apart from Contract.*

**1355.** It seems to be clear, upon the authorities, that in certain circumstances the proprietor of one piece of ground has a right, based entirely on custom, and apart from contract, to encroach upon the ground of his immediately adjoining neighbour for the purpose of building a common gable. This right, so contrary to the general theory of private ownership of land, obviously can only arise in very special circumstances and is of an anomalous character. It seldom exists except in regard to urban property in streets where there is continuous building. "The first builder," says Lord President Inglis in *Lamont v. Cumming*,<sup>2</sup> "is not bound to consult his neighbour when he builds. He is entitled by the custom of all burghs to build the wall half on his neighbour's ground. In the ordinary case he does so behind the back of his neighbour. The neighbour does not see how the thing is done, or exercise any control over its execution. He takes it for granted that it will be done in such a way as to afford him requisite accommodation." Again, in *Sinclair v. Brown Bros.*,<sup>3</sup> the Lord President says: "Now I think the common law rule just amounts to this, that in towns where continuous streets of houses are being built the party erecting a gable wall is entitled to erect it half on his own ground and half on that of his neighbour, and that when the neighbour builds on his ground the builder of the gable is entitled to claim payment of half what he has expended. The rule, however, admits of a good many exceptions, and would not be enforced except in cases where continuous streets are being built, or unless in other circumstances it was made clear in the contract that the gable was to be built on ordinary terms."

Lord Gifford, in *Jack v. Begg*,<sup>4</sup> after stating the rule in similar terms, says: "But all this proceeds from a tacit or implied contract, inferred

<sup>1</sup> *Ness v. Ferries*, 1825, 4 S. 7 (N.E. 7); *Mackenzie v. Mackenzie*, 1829, 8 S. 74; *Sinclair v. Brown Bros.*, 1882, 10 R. 45; *E. of Moray v. Aytoun*, 1858, 21 D. 33; *Rodger v. Russell*, 1873, 11 M. 671.

<sup>2</sup> 1875, 2 R. 784, at p. 787.

<sup>3</sup> 1882, 10 R. 45, at p. 50.

<sup>4</sup> 1875, 3 R. 35, at p. 41.

either from a feuing plan according to which the line of the street is to be built, or from the special circumstances of each case. Where there is no room for such implied contract and implied consent, the rule does not hold, and the builder of a tenement must build it, gable and all, entirely upon his own ground unless he gets the consent of his neighbour."

#### SUBSECTION (3).—*Circumstances Implying Consent.*

**1356.** One of the circumstances which imply consent is the custom of burghs, a fact which reconciles Lord Shand's judgment in *Baird v. Alexander*<sup>1</sup> with the statements of law already quoted. He says, referring to the right: "This law, of course, can never give anyone who desires to erect a house upon his own ground a right to occupy a part of his neighbour's ground for the gable of the house which he is erecting unless he has got the consent of that other person by specific agreement in writing or by tacit consent that it shall be so occupied." In the earliest reported case, *Wallace v. Brown*,<sup>2</sup> the ground of judgment was that under a feuing plan the feuars had to erect gables; but their right to do so proceeded not on contract with the neighbouring feuars but "from the necessity of the situation."<sup>3</sup>

**1357.** It is thus clear that the anomalous rule exists, but only in special circumstances, and chiefly where there is an unbroken line of building in the street of a burgh. But the rule does not extend to the case where the line of building would naturally not be continuous, as, *e.g.*, to land intended for villas or churches. Thus, in *Jack v. Begg*,<sup>4</sup> the owner of a plot of ground adjoining the site of a church removed a division wall and built a four-storey gable wall half on his own and half on the church ground without the leave of the trustees for the church. It was held that his operations were illegal and that the customary rule did not apply to such a case.<sup>5</sup>

#### SUBSECTION (4).—*Acquiescence as Personal Bar.*

**1358.** Such being the exceptional grounds on which the right to build a common gable partly on a neighbour's ground is based, it is not surprising that in disputes recourse has been frequently had to the doctrine of personal bar in defence of the position of the person who encroaches. Acquiescence is inferred from knowledge of the fact of building and the absence of timely remonstrance. Although in the cases where an undoubted right to build a common gable exists remonstrance would be unavailing, yet there may be cases of doubtful right where knowledge of the operations and absence of remonstrance

<sup>1</sup> 1898, 25 R. (H.L.) 35.

<sup>2</sup> Mor. App., Personal and Real, No. 4. See also *Law v. Monteith*, 1855, 18 D. 125.

<sup>3</sup> *Vide Walker v. Sherar*, 1870, 8 M. 494.

<sup>4</sup> 1875, 3 R. 35.

<sup>5</sup> See per Lord Gifford at p. 41.



render the position of the builder of the gable secure,<sup>1</sup> for "the law will presume an agreement or conventional permission as a fair ground of right."<sup>2</sup>

#### SECTION 4.—PROPRIETORS' RIGHTS IN A COMMON GABLE.

**1359.** While many of the legal rules incident to common gables have always been clearly recognised in practice, nevertheless from the theoretical standpoint much confusion has existed as to the legal principles to which these rules are referable. The observations in this regard of Lord Justice-Clerk Moncreiff in *Robertson v. Scott*<sup>3</sup> have already been quoted. The earliest theories may be summarised thus:

That the gable, though built partly on the ground of another, was solely the property of the builder until paid for.<sup>1</sup> This was the view taken in *Wallace v. Brown*,<sup>4</sup> but it is hardly consistent with the opinion expressed in the same judgment that the site of the gable was common, mutual, and indivisible. In *Hunter v. Luke*,<sup>5</sup> Lord Jeffrey, following *Wallace v. Brown*,<sup>4</sup> held that "the builder is sole proprietor of the gable until the party to divide it with him comes into existence. He is sole proprietor, with a kind of conventional servitude provided in favour of the party who comes to build on the adjoining stance to have right to one-half on paying the party who built it." This view was also adopted by Lord Ivory in *Law v. Monteith*.<sup>6</sup> In the same case Lord Curriehill held that when the second feuar uses the gable he takes only a *pro indiviso* right with his neighbour to what is built on his own ground, and that the right extends to that part of the gable which is built on the ground of the other feuar. He adds: "Whether that is a right to the *solum* or not I do not decide." Unless Lord Jeffrey held the view that the ownership of the stone and lime was separable from that of the site whereon the gable was built, his statement would seem to imply that the mere payment operates a conveyance of one-half of the wall to the adjoining feuar, and that after payment each feuar is absolute owner of the half of the wall upon his own ground. On this theory the element of mutuality disappears so soon as payment is made, a result inconsistent with the uses to which a common gable may be put, for each proprietor may use the whole gable so far as he does not infringe his neighbour's rights, while on the other hand his use is restricted and inconsistent with absolute ownership. Lord Fullerton said: "The right to a gable wall is indivisible."<sup>7</sup>

**1360.** In *Walker v. Sherar*<sup>7</sup> the theory is put forward that the gable and its site are common property, at least from the time of payment by the

<sup>1</sup> *Law v. Monteith*, 1855, 18 D. 125.

<sup>2</sup> Rankine, *Personal Bar and Estoppel*, p. 55; Bell, *Prin.*, s. 946.

<sup>3</sup> 1886, 13 R. 1127.

<sup>4</sup> *Mor. App.*, *Personal and Real*, No. 4.

<sup>5</sup> 1846, 8 D. 787.

<sup>6</sup> 1855, 18 D. 125.

<sup>7</sup> 1870, 8 M. 494, but see *infra*, para. 1361, as to "common property."



adjacent feuar. Lord President Inglis said: "We do not require any evidence of what is meant by a mutual gable; it is a wall in which there is a right of common property in the proprietors of the one house as much as in the other, whichever party builds it; but of course the one that does not erect it must pay a part of the expense as a condition of his right of common property." In *Rodger v. Russell*,<sup>1</sup> it was held, following *Wallace v. Brown*,<sup>2</sup> that the builder was owner of the whole wall until he was paid, but that the payment, when made, gave a title to the gable as common property, and to the use of it accordingly. Lord Justice-Clerk Moncreiff thought the builder had a right of property in the whole wall, qualified by an implied trust for the adjacent feuar, with an obligation on the builder to denude on payment of the price. He does not indicate precisely what the resulting relationship of the two proprietors is to be, or how the builder comes to be owner of the second half without a feudal title. Lord Cowan refused to allow that the payment passed the property of one-half of the gable. He thought the ground on which the gable stood was the property of the two feuars in equal shares *pro indiviso* from the time of its appropriation for the gable, subject to the real condition of paying one-half of the cost of the gable. Lord Neaves agreed that the site of the gable is common property and thought that the builder gives his neighbour a joint interest in the gable, and that the latter, by taking benefit, becomes liable to contribute to its cost.

**1361.** It seems clear that in some of the dicta the words "common property" were used in a special sense. Thus, in *Lamont v. Cumming*,<sup>3</sup> Lord President Inglis said: "But the pursuer strongly contends that, according to a general principle of law a mutual gable, being common property, cannot be touched by one owner without the consent of the other. That proposition lies at the foundation of the pursuer's case. It appears to me to be stated much more broadly than the authorities warrant, and indeed, when so stated, to be repugnant both to common sense and everyday practice. When the second builder comes to erect his house, if he constructs it in the ordinary way he must insert joists and drive in dooks for the purpose of supporting the woodwork of the lathing. In that way he necessarily interferes with the substance, the stone and lime, of the gable wall. Therefore the rule contended for by the pursuer cannot be applied absolutely. But the truth is that a gable is a subject of common property in a somewhat different way from any other thing, in this respect, that when it is originally built the party who builds has only beneficial enjoyment. The party who comes after has a right *in futuro*, which is available to him only when he comes to build. That is a very curious position. There may exist a right of common property in one sense even at that time; but it is a

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<sup>1</sup> 1873, 11 M. 671.

<sup>2</sup> 1808, Mor. App., Personal and Real, No. 4.

<sup>3</sup> 1875, 2 R. 784, at p. 787.

different description of right in the one party and in the other as regards the active title and possession."

**1362.** The subject was again considered in *Robertson v. Scott*,<sup>1</sup> a case in which the precise nature of the rights possessed in common gables by the adjacent feuars had to be determined. It was there decided that the building of a mutual gable did not give the builder a right of property in it, but only in the one-half built on his own ground and a right of exclusion from the other half until he should be paid therefor by the conterminous proprietor; and that this right when not founded on contract was a right to recompense and was extinguished on recompense being made. The judges held different views as to the nature of the feuars' rights in the gable. Lord Justice-Clerk Moncreiff said: "He [the first builder] has no title to his neighbour's ground according to the ordinary forms of conveyancing, and he never to the end acquires one. Nevertheless the gable is his gable until somebody else acquires the right to it, and that, again, is not acquired by any writing or title, but simply by the fact of using the gable as a mutual gable, and erecting the adjoining building in contact with and alongside of it. . . . The gable remains the property of the man who built it until the adjacent proprietor takes advantage of it by building in his turn." Lord Craighill said: "My opinion is that Stark did not become by its erection owner of this gable in its entirety. The one half was built on his own feu, the other half on the adjoining area, which at the time belonged to the magistrates, and so far as built upon ground which was not his, he was not the proprietor." And he held that the first builder had simply a right of exclusive use in the other half of the gable till recompense had been made. "The result," he continues, "is not the acquisition of a right of property in the wall, for that previously existed," but of a right to use the wall when recompense is rendered; and he indicates that the decision in *Earl of Moray v. Aytoun*,<sup>2</sup> and the opinion of Lord Neaves in *Rodger v. Russell*,<sup>3</sup> are in harmony with his views of the law of the case. Lord Rutherford Clark held that the builder of the gable became proprietor only of the half of it which stood upon his own land; to hold that he became proprietor of the other half "would be contrary to every rule of law." "Where a gable of this sort is built in part upon the ground of the adjacent proprietor, the right of the builder necessarily stops at the central line which is the termination of his own property. And when the former occupies that gable, it is not common property, because that would be contrary to the title. But each has his property, each for his own share, while each has a common interest in the whole. The builder is at first proprietor of only half the wall, and the consequence of that position is that he has by the fact of building, and so long as he remains proprietor, the right to prevent any person from using it until he is paid the cost of half of it. That right is real. He is entitled to prevent its being used until he is paid. But

<sup>1</sup> 1886, 13 R. 1127.

<sup>2</sup> 1858, 21 D. 33.

<sup>3</sup> 1873, 11 M. 673.

when he is paid the restriction of use ceases. The proprietor of either half is free to use it." And he approves of the judgment of Lord Mackenzie in *Hunter v. Luke*.<sup>1</sup> This view of Lord Rutherford Clark seems to give the simplest, and, from the theoretical standpoint, the most satisfactory solution of the question.<sup>2</sup>

1363. In *Baird v. Alexander*,<sup>3</sup> the Lord Chancellor says, in relation to the rights of conterminous feuars: "It would be untrue to say that either of them is vested with half of the wall, because each of them is supposed to possess, and does possess in right of accommodation and in right of support, the whole wall." Probably the Lord Chancellor had in view that a common interest in the gable belonged to each proprietor, qualifying or extending his proprietary rights, as explained by Lord President Inglis in *Lamont v. Cumming*.<sup>4</sup>

#### SECTION 5.—SPECIAL CASES OF COMMON GABLES.

1364. Questions have arisen in several cases as to whether certain gables were truly common gables. Thus, in *Walker v. Sherar*,<sup>5</sup> it was decided that the gable was mutual although it was erected wholly within the ground of its builder. This result was reached on a construction of the titles, and Lord President Inglis observed that it was intended by the titles that the party building should either build partly on his own and partly on his neighbour's ground, or entirely on his own ground, and yet the wall was to be a mutual wall. In *Sanderson v. Geddes*,<sup>6</sup> it was held that a gable which had been built by one of two adjoining proprietors wholly upon the ground of his neighbour was a common gable. Two cottages were separated by a clay gable four feet thick. The proprietor of the western cottage, with the knowledge of his neighbour, pulled down his cottage and erected on the site a house of three storeys with a stone and lime gable two feet thick, built entirely on the eastern half of the site of the old gable, thereby throwing the two feet of space thus gained into his own house. The conterminous owner raised an action of declarator to have the area of his plot defined and to have it declared that the wall was built wholly within his ground, that the property in it was accordingly his, and that he was entitled to remove the wall at the defender's expense. The Court held that the gable must be treated as if it were a common gable, that if the pursuer used it he must pay half of the cost of the part which he used, and that on the other hand the builder of the gable must make a deduction for the value of that part of the *solum* of the old gable which he had appropriated from his neighbour. The latter was held to be barred from seeking removal of the gable because it had been erected in his knowledge and

<sup>1</sup> 1846, 8 D. 787.

<sup>2</sup> See *Berkeley v. Baird*, 1895, 22 R. 372, where Lord McLaren says that the same rule is laid down in Bell, Prin., s. 1078.

<sup>3</sup> 1898, 25 R. (H.L.) 35.

<sup>5</sup> 1870, 8 M. 494.

<sup>4</sup> 1875, 2 R. 784, at p. 787.

<sup>6</sup> 1874, 1 R. 1198.



without objection. In commenting upon this case Lord Watson pointed out that the effect of the judgment was not to deprive the adjoining owner of his right of property but merely of the exclusive use and possession of his property until the new gable became ruinous or was pulled down.<sup>1</sup> The case was highly special.<sup>2</sup>

**1365.** A wall already built may assume the character of a mutual wall by the separation of the ownership of the houses to which it belongs; e.g. in a testamentary settlement, as in the case of *Cuthbert v. Whitton*.<sup>3</sup> The wall in question was not a gable, but the law would be the same in the case of a gable wall. The decision, however, proceeded on the titles. In *Fraser v. Campbell*<sup>4</sup> a wall which had been used by both adjoining proprietors as a gable was held, on the titles, not to be a common gable.

#### SECTION 6.—USE OF COMMON GABLES.

**1366.** In virtue of his common interest<sup>5</sup> the second feuar who comes to build may "take band," i.e. insert the bandstones and beams of a building in the course of erection into the wall of the adjoining building,<sup>6</sup> insert joists, make fireplaces and vents, and heighten the gable,<sup>7</sup> but these operations must be so conducted as not to injure the gable or the neighbour's property.<sup>7</sup> The depth to which the second builder may take band is usually fixed by custom of burgh or by express agreement.<sup>8</sup> When a person demolished his tenement with a view to its reconstruction and with the intention of leaving the common gable standing, and found that the common gable, though not injured by these operations, was so decayed that it had to be removed by order of the Dean of Guild Court, he was held to be entitled to rebuild the gable and to recover half the cost of rebuilding from his neighbour.<sup>8</sup> It was stated by the Court that it was no answer to the pursuer's claim that the gable would have been sufficient as a common gable but for the removal of the support of the pursuer's tenement. If, however, the bad condition of the gable has been caused entirely by the fault of one owner he is liable for the cost of restoring it.<sup>9</sup> Nothing may be done but what is fair and reasonable.<sup>10</sup> "The inconvenience caused by repair must be borne without indemnification, since it results from the nature of things."<sup>9</sup> But actual damage done to a neighbour's property, e.g. by the removal of some of the slates of his roof during lawful operations on the gable, must

<sup>1</sup> *Grahame v. Mags. of Kirkcaldy*, 9 R. (H.L.) 93.

<sup>2</sup> So also were the cases of *Cuthbert v. Whitton*, 1888, 16 R. 259, and *Fraser v. Campbell*, 1895, 22 R. 558.

<sup>3</sup> 1888, 16 R. 259.

<sup>4</sup> 1895, 22 R. 558.

<sup>5</sup> Bell, Prin., s. 1086.

<sup>6</sup> *Walker v. Sherar*, 1870, 8 M. 494.

<sup>7</sup> *Lamont v. Cumming*, 1875, 2 R. 784, per Lord President at p. 788; *Robertson v. Scott*, 1886, 13 R. 1127; *Dow & Gordon v. Harvey*, 1869, 8 M. 118; *Bryce v. Norman*, 1895, 2 S.L.T. 471 (heightening and widening gable).

<sup>8</sup> *Stark Trs. v. Cooper's Trs.*, 1900, 2 F. 1257.

<sup>9</sup> Rankine, Land-Ownership, p. 653 (4th ed.).

<sup>10</sup> Per Lord Deas in *Lamont v. Cumming*, 1875, 2 R. 784, at p. 790.



be restored.<sup>1</sup> One of the owners is not entitled to make a furnace flue in the gable so as to cause over-heating, and in a case where he had done so the process was sisted to allow him to lodge a minute stating how he intended to avoid the nuisance.<sup>2</sup>

**1367.** Lord Deas thought that a gable "should be put to no use not inherent in its nature,"<sup>3</sup> e.g. cutting into the gable for wall presses. But probably the test of injury to the neighbour, actual or prospective, is sufficient. In *Allan & Co. v. The Glasgow Union Rly. Co.*,<sup>4</sup> Lord Curriehill (Lord Ordinary) held that the owner of a denuded gable may, without the consent of his neighbour, use it for the display of advertisements. Where the gable is that of a tenement divided into flats owned by different proprietors, each owner of a flat is owner *ad medium filum* of that part of the gable which bounds his flat, and has a common interest in the rest of the gable. The owner of a lower flat was held entitled to prevent the proprietor of an upper flat from making doorways through the gable into the adjoining house, on the ground that the chimneys of the lower proprietors would be interfered with.<sup>5</sup> But similar operations not causing injury were held in another case<sup>6</sup> to be legal. In that case, however, the gable was not a common gable.

## SECTION 7.—RECOMPENSE FOR USE.

### SUBSECTION (1).—*The Right to recover Part Cost of Building.*

**1368.** Where the right to recover part of the cost exists at common law the claim is for recompense.<sup>7</sup> The right is a real right, and passes to the singular successors of the original builder,<sup>8</sup> or to an adjudging creditor.<sup>9</sup> It passes with the house without being specially mentioned in the conveyance.<sup>9</sup> Even the original owner of two adjoining lots who built the common gable and thereafter sold the first lot without reserving the right to recompense, found himself liable as owner of the second lot to the owner of the first when he came to build.<sup>10</sup> The right is "not properly a real burden but a right of property, and therefore subsists against all who make use of the gable until the price is paid."<sup>11</sup> Renunciation of the feu will not enable the feuar to escape liability for his share of the cost after payment has become due.<sup>12</sup>

<sup>1</sup> *Lamont v. Cumming*, 1875, 2 R. 784. References to foreign law will be found in Rankine, *Land-Ownership*, chap. xxxii. Part II. (4th ed.).

<sup>2</sup> *Wilsons v. Brydone*, 1877, 14 S.L.R. 667.

<sup>3</sup> *Lamont v. Cumming*, *supra*.

<sup>4</sup> Winter Session, 1876–7, cited in Rankine on *Land-Ownership*, p. 652.

<sup>5</sup> *Gellatly v. Arrol*, 1863, 1 M. 592.

<sup>6</sup> *Todd v. Wilson*, 1894, 22 R. 172.

<sup>7</sup> *Sinclair v. Brown Bros.*, 1882, 10 R. 45, per Lord Shand at p. 52.

<sup>8</sup> *Hunter v. Luke*, 1846, 8 D. 787; *Rodger v. Russell*, 1873, 11 M. 671.

<sup>9</sup> *Law v. Monteith*, 1855, 18 D. 125, per Lord Ivory.

<sup>10</sup> *Royal Infirmary of Glasgow v. Wylie*, 1877, 4 R. 894; *Berkeley v. Baird*, 1895, 22 R.

372. *Rodger v. Russell*, *supra*, per Lord Justice-Clerk.

<sup>12</sup> *Thorburn v. Pringle*, 1832, 10 S. 822.

SUBSECTION (2).—*Time of Payment.*

**1369.** The time when payment is due by an adjacent proprietor for his share of the cost of a common gable is, apart from contract,<sup>1</sup> coincident with the date when he first makes use of the gable<sup>2</sup>, *i.e.* when he begins to build.<sup>3</sup> If the gable is not utilised at all nothing is due at common law. But it is sometimes stipulated in feu-rights that payment shall be exigible when the second feu is given off by the superior,<sup>4</sup> or within a specified time thereafter.<sup>5</sup> To remove the unused half is not equivalent to using it, and no liability for payment results from the removal.<sup>6</sup> Once recompense is made, those who paid and all deriving right from them are thenceforward as free to use the gable as if they had been the builders.<sup>7</sup>

SUBSECTION (3).—*Extent of Liability.*

**1370.** It would appear that at common law the person who uses the common gable is only liable for one-half the cost of so much of the gable as he actually uses.<sup>8</sup> The common law rule was contended for in *Ness v. Ferries*,<sup>9</sup> but the Court held that the liability was for a share of the whole gable because the contract so provided. The claim is for recompense and must be measured by the benefit received. Should one party heighten the gable for his own convenience it is difficult to see how his neighbour could be called on to pay part of the cost, assuming he was to take no benefit therefrom. In *Sanderson v. Geddes*,<sup>10</sup> the Lord Ordinary (Gifford) took this view, and his opinion thereon was not challenged in the Inner House. In *Roberts v. Galloway*,<sup>11</sup> a share of the cost of half a common gable in a tenement of flats was claimed by the owners of flats who did not own any part of the gable but only possessed a common interest in it as part proprietors of the tenement. The claim was repelled on the ground that only ownership in the gable could found such a claim.<sup>12</sup>

SUBSECTION (4).—*Is the Right to Payment separable from the Subject?*

**1371.** Questions have been mooted whether the right to recover from a neighbour a share of the cost of his half of a common gable can competently be reserved from a sale of the stance, or can be acquired by

<sup>1</sup> *Earl of Moray v. Aytoun*, 1858, 21 D. 33.

<sup>2</sup> *Hunter v. Luke*, 1846, 8 D. 787; *Law v. Monteith*, 1855, 18 D. 125; *Rodger v. Russell*, 1873, 11 M. 671; *Jack v. Begg*, 1875, 3 R. 35; *Glasgow Infirmary v. Wylie*, 1877, 4 R. 894.

<sup>3</sup> *Robertson v. Scott*, 1886, 13 R. 1127, per Lord Justice-Clerk; *Rodger v. Russell*, *supra*, per Lord Justice-Clerk at p. 673.

<sup>4</sup> *Sinclair v. Brown Bros.*, 1882, 10 R. 45.

<sup>5</sup> *Calder v. Pope*, 1900, 8 S.L.T. 149.

<sup>6</sup> *Sanderson v. Geddes*, 1873, 1 R. 1198.

<sup>7</sup> 1873, 1 R. 1198. See, however, Rankine, Land-Ownership, 4th ed., p. 654.

<sup>8</sup> 1898, 6 S.L.T. 25.

<sup>9</sup> 1825, 4 S. 7.

<sup>10</sup> Cf. *Johnston v. White*, 1877, 4 R. 721.

<sup>11</sup> *Mackenzie v. Mackenzie*, 1829, 8 S. 74.

<sup>12</sup> *Robertson v. Scott*, *supra*.

assignation separately from the subjects or by purchase, as a separate subject, of the unused half of the gable. In *Earl of Moray v. Aytoun*,<sup>1</sup> the superior had reacquired a feu by renunciation from his vassal after the latter had built to some extent upon it and paid for the mutual gable. The superior also received a formal assignation to all claim to the gable. He afterwards feued the same subjects to another person, without any mention of the gable or reservation of his right thereto. When the new feu was built, payment was again demanded by his neighbour. The superior came forward and claimed the payment in virtue of his assignation. It was decided that he had no title to sue as he had conveyed to the new feu without reserving any claim in respect of the common gable. Lord Wood thought that the claim to payment could not be separated from the ownership of the gable. But this view, which proceeded on the assumption that the whole gable was common property, and that the right to payment was inseparable from the common subject, is hardly tenable if the claim is truly one of recompense.<sup>2</sup> In *Calder v. Pope*,<sup>3</sup> where a disponent reserved to himself the right to recover payment from the adjoining feu, Lord Kincairney thought that the claim was good; and in *White v. Weir*,<sup>4</sup> where an assignee sued the adjacent owner for the cost, Lord Kyllachy granted decree in his favour.

SUBSECTION (5).—*Where the Gable is Part of a Security Subject.*

**1372.** Where a common gable is part of the subjects conveyed under a bond and disposition in security the question arises whether the heritable creditor possesses the right to exact payment for the use of the gable to the exclusion of the debtor's claim. In *Hunter v. Luke*,<sup>5</sup> a heritable creditor, whose security, however, was an *ex facie* absolute disposition, was preferred to the payment over the trustee in bankruptcy. It would be unsafe to make payment to the proprietor without first obtaining the consent of the heritable creditor. The right to payment is a real right, and to pay the proprietor would diminish the security of the creditor.

SUBSECTION (6).—*Transmission of the Obligation of Recompense.*

**1373.** Like the right to claim recompense, the obligation to pay also transmits against singular successors.<sup>6</sup> "If a party takes advantage of a mutual gable, he takes it on the condition of paying for it."<sup>7</sup> It is no defence to a claim in respect of a mutual gable that the gable was erected

<sup>1</sup> 1858, 21 D. 33.

<sup>2</sup> *Supra*, para. 1360.

<sup>3</sup> 1900, 8 S.L.T. 149.

<sup>4</sup> 1895, 2 S.L.T. 453. The meagre report in this case bears that White "purchased the half of the gable." It is understood, however, that he was merely an assignee to the right to recover, and not the purchaser of the gable.

<sup>5</sup> 1846, 8 D. 787.

<sup>6</sup> *Law v. Monteith*, 1855, 18 D. 125, per Lord President M'Neill; *Rodger v. Russell*, 1873, 11 M. 671, per Lord Justice-Clerk Moncreiff at p. 673.



by the common author of the conterminous proprietors.<sup>1</sup> Where a mutual gable has not been utilised and a purchaser acquires the feu on which the unoccupied part of the gable stands, he is put on his inquiry as to whether payment has already been made for the gable. Even if temporary buildings have been erected against the gable, the duty of making inquiry still rests with him, for the existence of such buildings rather indicates that ordinary use of the gable has not been taken, and that it has not been paid for.<sup>1</sup>

#### SECTION 8.—COMMON GABLES IN FLATS.

**1374.** The law applicable to common gables in flats belonging to different proprietors is part of the well-known law of the tenement.<sup>2</sup> Each proprietor is owner to the middle plane of the gable so far as it bounds his own property, and has a right of common interest in the whole of the gable. The proprietor of a lower flat is entitled to prevent the owner of an upper flat from cutting through the gable to make doorways into a house in the adjoining tenement, if injury will be done thereby to the lower owner's chimneys.<sup>3</sup> The "common interest" differs from servitude in that each person concerned is bound by the common interest to maintain his own wall, which in mere servitude he would not be bound to do.<sup>2</sup>

#### SECTION 9.—ENCROACHMENTS AND REMEDIES.

**1375.** Where gables have been built illegally so as to encroach on a neighbour's ground the natural remedies are interdict and removal; but cases have occurred where, owing to the drastic character of these remedies, the Court has been unwilling to give effect to them and has attempted to give equitable compensation in their place. In *Jack v. Begg*,<sup>4</sup> the proprietor of a piece of ground in the suburbs of Edinburgh, without consent of the conterminous proprietor, and pending unsuccessful negotiations as to the terms on which consent to build should be given, removed a mutual wall between the stances and erected on its site a gable of four storeys. In an action of declarator and removal, the Court held these operations to be illegal, but instead of granting decree of removal of the encroaching part of the gable, the Court imposed equitable conditions on which the gable was allowed to stand, viz. that the pursuer should be allowed to use the gable when he came to build on his own ground, without payment. The exercise of such a discretionary power can only be justified where there are exceptional reasons for depriving a litigant of the ordinary remedies for enforcing his

<sup>1</sup> *Glasgow Royal Infirmary v. Wylie*, 1877, 4 R. 894; *Sinclair v. Brown Bros.*, 1882, 10 R. 45.

<sup>2</sup> Bell, Prin., s. 1086.

<sup>3</sup> *Gellatly v. Arrol*, 1863, 1 M. 592. See para. 1367, *supra*.

<sup>4</sup> 1875, 3 R. 35.



rights. Lord Watson, in commenting on this case,<sup>1</sup> while admitting the competency of the Court to decline, upon equitable grounds, to enforce an admittedly legal right, said : "I am not satisfied that the result at which the Court arrived is such as your Lordships ought to approve," and says the judgment "appears to me to trench upon private rights of property to an extent altogether unwarranted by any previous authority in the law of Scotland. The practical effect of the judgment was that the Court gave the wrongdoer compulsory powers to acquire part of his neighbour's property, which, in spite of remonstrance, he had illegally appropriated."

**1376.** In *Wilson v. Pottinger*,<sup>2</sup> it was held that a proprietor, into whose stance an encroachment of  $4\frac{1}{2}$  inches in the upper part of the gable had been made, was barred by his actings in the Dean of Guild Court from insisting in his legal rights, and the opinion was expressed by the Court that as the encroachment had not been made in bad faith, did not alter the boundary of the gable, and was of small importance, compensation, not removal, was the appropriate remedy. The case of *Sanderson v. Geddes*, where a gable had been built by one proprietor wholly on the ground of his neighbour, has already been referred to.<sup>3</sup>

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<sup>1</sup> *Grahame v. Mags. of Kirkcaldy*, 1882, 9 R. (H.L.) 91.

<sup>2</sup> 1908 S.C. 580.

<sup>3</sup> Para. 1364, *supra*.

## COMMON GOOD.

*See* BURGH.

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## COMMON LAW.

*See* LAW.

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## COMMON LODGING-HOUSE.

*See* PUBLIC HEALTH.

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## COMMON PASTURAGE.

*See* SERVITUDE.

# COMMON PROPERTY AND COMMON INTEREST.

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## SECTION 1.—COMMON PROPERTY.

### SUBSECTION (1).—*Definition.*

1377. "Common property is a right of ownership vested *pro indiviso* in two or more persons, all being equally entitled to enjoy the uses and services derivable from the subject; and the consent of all being requisite in the management, alteration, or disposal of the subject." <sup>1</sup> Common property must be distinguished from the right of heirs-portioners, who are not joint proprietors, but, as their name imports, part owners or portioners. They hold *pro indiviso* while the subject is undivided, but each has a title in herself to her own part or share, which she can alienate or burden by her own separate act. "The condition of two joint proprietors in the fee is very different: they have no separate estates, but only one estate vested in both, not merely *pro indiviso* in respect of possession, but altogether *pro indiviso* in respect of right." <sup>2</sup>

### SUBSECTION (2).—*Management.*

1378. The general principle in regard to management of subjects which are held as common property is *melior est conditio prohibentis*. Unless there is an agreement to the contrary effect, each joint proprietor has a vote negative of acts that are not necessary for the property. <sup>3</sup> All

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GENERAL AUTHORITIES.—*Common Property*, Stair, i. 7, 15, i. 16, 4; Ersk. iii. 3, 56; Bankton, i. 8, 38; Bell, Prin., s. 1072; Rankine on Land-Ownership, 4th ed., p. 585. *Common Interest*, Stair, ii. 7, 6; Ersk. ii. 9, 11; Bankton, ii. 7, 9; Bell, Prin., s. 1086; Rankine on Land-Ownership, 4th ed. 655, *et seq.*

<sup>1</sup> Bell, Prin., s. 1072.

<sup>2</sup> *Cargill v. Muir*, 1837, 15 S. 408, per L. Moncreiff, Lord Ordinary, adopted by Lord Justice-Clerk Hope in *M'Neight v. Lockhart*, 1843, 6 D. 128, at p. 136; Rankine on Land-Ownership, 4th ed., p. 585.

<sup>3</sup> Stair, i. 16, 4.

the proprietors have an equal voice in the management; and however small his share is, each is entitled to refuse to act with the other.<sup>1</sup> One *pro indiviso* proprietor has not, as a rule, a title to sue a declarator in regard to the property without the concurrence of the other or others.<sup>2</sup> As Lord Curriehill put it, in an action of declarator of marches, "The party pursuing such an action must be the owner of the property, and, indeed, the exclusive owner of it; for this reason, that the decree would not be *res judicata* against any other party to whom it might in part belong."<sup>3</sup> An objection to the pursuer's title must be taken *in initio litis*. Where, however, an encroachment on the possession of the property is challenged, one proprietor is not entitled to tie the hands of his co-proprietor:<sup>4</sup> nor does the rule as to joint action hold where one co-proprietor proposes to execute a necessary restoration of the subjects after damage by fire.<sup>5</sup>

1379. Where there is no room for a division and sale on account of the subsistence of a liferent, or where the *pro indiviso* right is a liferent, and the parties cannot agree on a manager, the Court will appoint a judicial factor, so as to prevent the control of the common subject falling into the hands of parties who have only a partial interest.<sup>6</sup> It is probable that where the remedy of division and sale is open, it is not competent to appoint a judicial factor, unless in very exceptional cases.<sup>7</sup> Special circumstances may warrant the appointment of a factor, even after the decree of division has been obtained.<sup>8</sup>

1380. Co-proprietors are jointly and severally liable for burdens existing on the property at the date when it becomes common. After that, each can burden the property up to his individual share only.<sup>9</sup>

### SUBSECTION (3).—*Power of Veto.*

1381. One co-proprietor may prevent another from removing tenants unless better rents or better security is offered,<sup>10</sup> or from sequestrating tenants for rents.<sup>11</sup> All the co-proprietors must concur in granting leases;<sup>12</sup> so also they must concur in sequestrating a tenant,<sup>11</sup> or in removing him.<sup>13</sup> The smallness of interest makes no difference, even if

<sup>1</sup> *Bruce v. Hunter*, 16th Nov. 1808, F.C.

<sup>2</sup> *Millar v. Cathcart*, 1861, 23 D. 743.

<sup>3</sup> *Ibid.*, at p. 746.

<sup>4</sup> *Lade v. Largs Baking Co.*, 1863, 2 M. 17, Lord Curriehill at p. 20; *Johnston v. Craufurd*, 1855, 17 D. 1023.

<sup>5</sup> *Deans v. Woolfson*, 1922 S.C. 221.

<sup>6</sup> *Mackintosh*, 1849, 11 D. 1029; *Watson v. Crawcour*, 1856, 19 D. 70; *Watson*, 1856, 19 D. 98; *M'Whirter*, 1852, 14 D. 761.

<sup>7</sup> *Morrison*, 1857, 20 D. 276.

<sup>8</sup> *Bailey v. Scott*, 1860, 22 D. 1105.

<sup>9</sup> Rankine on Land-Ownership, 4th ed., p. 585.

<sup>10</sup> *Grozier v. Downie*, 1871, 9 M. 826.

<sup>11</sup> *Stewart v. Wand*, 1842, 4 D. 622.

<sup>12</sup> *Hunter*, Landlord and Tenant, 4th ed., i. 129; Rankine on Leases, 3rd ed., p. 82; *Campbell v. Campbell*, 24th Jan. 1809, F.C.

<sup>13</sup> *Murdoch v. Inglis*, 1679, 3 Br. Supp. 297. See also *Walker v. Hendry*, 1925 S.C. 855.



it be 7<sup>1</sup><sup>st</sup> part.<sup>1</sup> A co-proprietor may prevent any extraordinary use of the subject that may be prejudicial to his interest—such as one of the co-proprietors giving a stranger a right to cut and drive peats; <sup>2</sup> or letting the shootings.<sup>3</sup> A co-proprietor may prevent any operations on the common subject by which its condition is altered, as carrying a flue up to the roof through the common subjects; <sup>4</sup> removing tenants to the prejudice of other proprietors; <sup>5</sup> making an entry into a common passage; <sup>6</sup> opening a doorway in a gable to the prejudice of the lower proprietors; <sup>7</sup> raising a mutual wall; <sup>8</sup> altering a common staircase.<sup>9</sup> The exception to this rule is that necessary operations in rebuilding and repairing are not to be stopped by the opposition of any of the joint owners.<sup>10</sup> As to the competency of an indweller in a burgh using a plea against a co-proprietor with the burgh as to common property, which the burgh had refrained from using, see the case undernoted.<sup>11</sup>

#### SUBSECTION (4).—*Division.*

**1382.** It is obvious that such a condition of ownership as that of which we treat should be capable of being easily brought to an end, if necessary. Hence the rule that, in the absence of agreement of parties, any common owner may insist, without reason assigned,<sup>12</sup> on having the common property divided, or, if that be impossible, on having it sold and the price divided.<sup>13</sup> The granting of a bond by the co-proprietors over the whole subjects does not amount to an agreement not to resort to a division.<sup>14</sup> This rule, of course, does not apply to co-partners or trustees, or to such as are in right of a mere *jus accrescendi*, as occurs in some kinds of *mortis causa* destination. The second class above mentioned have their remedy under the Trusts Acts.<sup>15</sup> The action by which the co-owner obtains his remedy is a lineal descendant of that known to the Roman law as *communi dividundo*, for particulars of which, see the opinion of Lord Rutherford in *Brock v. Hamilton*.<sup>16</sup> The process by which this remedy was obtained in former times was by brieve of division; but this has been almost entirely superseded by the declarator of division (and sale), which may be brought either in the Court of Session or, since

<sup>1</sup> *Bruce v. Hunter*, 16th Nov. 1808, F.C.

<sup>2</sup> *Wilson v. Buchanan*, 1800, Hume, Dec., 120.

<sup>3</sup> *Campbell v. Campbell*, 24th Jan. 1809, F.C.

<sup>4</sup> *Taylor v. Dunlop*, 1872, 11 M. 25.

<sup>5</sup> *Halliday v. Bruce*, 1681, Mor. 2449.

<sup>6</sup> *Anderson v. Dalrymple*, 1799, Mor. 12831; *Reid v. Nicol*, Mor. *voce* Property, App. No. 1; *Alexander v. Couper*, 1840, 3 D. 249.

<sup>7</sup> *Gellatly v. Arrol*, 1863, 1 M. 592.

<sup>8</sup> *Dow & Gordon v. Harvey*, 1869, 8 M. 118.

<sup>9</sup> *Taylor v. Dunlop*, 1872, 11 M. 25; *Sandy v. Innes*, 1823, 2 S. 221; Bell, Ill. 2, 152; *Anderson v. Saunders*, 1831, 9 S. 564.

<sup>10</sup> Bell, Prin., s. 1075; *Deans v. Woolfson*, 1922 S.C. 221.

<sup>11</sup> *Warrand v. Watson*, 1905, 8 F. 253.

<sup>12</sup> *Frizell v. Thomson*, 1860, 22 D. 1176.

<sup>13</sup> Bell, Prin., ss. 1079–1082.

<sup>14</sup> *Morrison v. Kirk*, 1912 S.C. 44.

<sup>15</sup> *Kennedy & Tullis v. Incorporation of Maltmen of Glasgow*, 1885, 12 R. 1026.

<sup>16</sup> 1852, 19 D. 701.

1907, in the Sheriff Court.<sup>1</sup> A clause in a feu-charter granting a *pro indiviso* share of subjects and prohibiting the feuar bringing an action for division will not avail to deprive him of his right, at least in the case of singular successors.<sup>2</sup> If the co-owners cannot be found, it is necessary, in order to render the title valid to a purchaser, to include a conclusion for adjudication.<sup>3</sup> The action is proper in the Outer House, as not requiring an exercise of *nobile officium*.<sup>4</sup> The Court appoints a man of skill, who suggests a scheme of division, or, if that be inadvisable, fixes the price and conditions of sale, *e.g.* a power of bidding reserved to *pro indiviso* proprietors.<sup>5</sup>

**1383.** An inquiry may be necessary to secure an equal share of profits to the co-owners proportionate to their shares in the subject, to ascertain the burdens and allocate them in their due proportions, to repay to one of the owners sums disbursed by him, or to secure restoration of such profits as have been wrongly appropriated.<sup>6</sup> The Conveyancing Act of 1874 has introduced a novelty in the procedure for completing the transfer, which formerly needed mutual conveyances, by giving to the decree of the Court, arbiter, or oversman the effect of a conveyance. A co-owner is entitled to recover from the price any expenditure by him on necessary meliorations.<sup>7</sup> If a co-owner refuses to execute a conveyance following on a sale, the Clerk of Court may be authorised to sign on his behalf.<sup>8</sup> The titles remain with the owner of the largest interest, but if there be no disparity, are put in neutral hands.<sup>9</sup> Should a co-owner refuse to sell, he must shew that the subject is incapable of division; but a reasonable discretion must be exercised by the Court in considering the question, and the differing interests of the owners kept in view.<sup>10</sup> Thus an inn cannot be divided into four parts, nor a brewhouse into two.<sup>11</sup> The case of *Thom*<sup>12</sup> also lays down that the sale must be by public roup; that power may be retained by terms of articles enabling those interested to offer for the subject; that a co-owner who holds in trust may bring an action of division and sale without power of sale in his trust deed, this being held to be a mere act of administration.<sup>13</sup> The procedure of the Court in these matters is strict, and involves a full inquiry.<sup>14</sup>

<sup>1</sup> Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51), s. 5 (3).

<sup>2</sup> *Grant v. Heriot Trust*, 1906, 8 F. 647, per Lord Pres. Dunedin at p. 658. See this case also as to the validity of a building restriction imposed by *pro indiviso* proprietors as against singular successors of the grantees.

<sup>3</sup> *Campbell* (O.H.), 1893, 1 S.L.T. 157.

<sup>4</sup> *M'Brice v. Paul*, 1862, 24 D. 546.

<sup>5</sup> *Thom v. Macbeth*, 1875, 3 R. 161.

<sup>6</sup> Rankine on Land-Ownership, 4th ed., p. 594.

<sup>7</sup> *D. & S. Miller v. Crichton* (O.H.), 1893, 1 S.L.T. 262.

<sup>8</sup> *Whyte v. Whyte* (O.H.), 1913, 2 S.L.T. 85.

<sup>9</sup> Bell, Prin., s. 1085.

<sup>10</sup> Lord Gifford's opinion in *Thom v. Macbeth*, 1875, 3 R. 161, at p. 165; *Bryden v. Gibson*, 1837, 15 S. 486.

<sup>11</sup> *Milligan v. Barnhill*, 1782, Mor. 2486. See also terms of report in *Thom*, *supra*.

<sup>12</sup> *Supra*.

<sup>13</sup> *Craig v. Fleming*, 1863, 1 M. 612.

<sup>14</sup> *Frizzell v. Thomson*, 1860, 22 D. 1176.

SUBSECTION (5).—*Præcipuum*.

1384. Feudalism bequeathed the practice that, of heirs-portioners taking *ab intestato* or under a clause of "heirs whatsoever,"<sup>1</sup> the eldest takes as a *præcipuum*, in addition to her share and without compensation to the others, the mansion-house of a landed estate with the necessary adjuncts, but considerations of amenity are not to be considered in determining what adjuncts are necessary.<sup>2</sup> The rule as to *præcipuum* does not hold as to a town house or a mere villa.<sup>3</sup> Feu-duties are divided among heirs-portioners, and an heir-portioner need not bring casualties into her reckoning of the recompense due to the others. A blench-holding is a *præcipuum*.<sup>4</sup> But no *præcipuum* is due where heirs-portioners take under a special deed.<sup>5</sup>

## SECTION 2.—COMMONTY.

SUBSECTION (1).—*Definition*.

1385. This is a peculiar form of common property in land, of great antiquity, but now, by force of private arrangements or by stress of statute, nearly obsolete. It is not clear whether it arose out of provisions for the cultivation and use of the barony and manor, or whether these were superimposed on it. In historical times it appears as common property in moorland or outfield land, held by persons owning neighbouring lands in severalty, as accessory to the lands so held. It is constituted (in terms which must be distinguished from the terms used in describing common pasture) (see *SERVITUDE*) expressly by disposition "*cum communis*," "*cum communio*," "with commonty," adding the name of the moor, or, in the absence of a name, identifying it by means of the possession. Prescriptive possession may explain a bare grant of land in severalty—with or without a clause of "parts and pertinents"—as including a right of commonty, even in opposition to adverse titles in favour of a rival, and to a neglected decree of Court.<sup>6</sup>

SUBSECTION (2).—*Right of Veto*.

1386. In commonty the cardinal rule relating to common property of all kinds obtains, and thus each commoner has a veto against attempts by any other to put the common to other than its ordinary use as land for pasturing stock and yielding fuel, feal, and divot. The right to mine or quarry in an undivided common is vested in the commoners jointly, and is thus available only by general consent.

<sup>1</sup> *Dinniston v. Welsh*, 1830, 8 S. 935.

<sup>2</sup> *Callander v. Harvey*, 1916 S.C. 420.

<sup>3</sup> *Rae v. Rae*, 1809, Hume, Dec. 764.

<sup>4</sup> *M'Neight v. Lockhart*, 1843, 6 D. 128.

<sup>5</sup> *Cathcart v. Rocheid*, 1773, Mor. 5375, 5 Br. Supp. 465.

<sup>6</sup> *Earl of Fife's Trs. v. Cuming*, 1830, 8 S. 326; 1831, 9 S. 336.



SUBSECTION (3).—*Division of Commonly.*

**1387.** The common law of division of common property was found to be too weak to deal with this complicated relation. But a single general Enclosure Act <sup>1</sup> has worked so smoothly as to save Scots landowners from having to resort to private Acts. From its operation are excepted commonities belonging to the King (of which none are known to exist), and commonities belonging to royal burghs (which have nearly vanished, owing to the corruption or improvidence of town councils), and, to some extent, mosses. The action of division proceeds in the Inner House of the Court of Session,<sup>2</sup> or, since 1907, in the Sheriff Court.<sup>3</sup> The Court appoints a man of skill to prepare a scheme of division, and will not interfere with his discretion on matters of practical detail.<sup>4</sup> The division takes place in proportion to the *valued* rents of the principal lands, except in the case of mosses, where the criterion is frontage. No right attaches to the holding of superiorities; and the feu-duties exigible from each claimant are added to his rental in calculating his share of the commonly. Each gets the part thereof nearest to his land. The division cannot proceed under the Act if there be only one owner of the moor, who holds subject to different rights of common pasturage. But these may, in the course of the process—though not in virtue of the statute—be allocated on the divided lands, or commuted for shares thereof. A simple mode of making up titles to the lands acquired in severalty, namely, by recording the decree of division in the Register of Sasines, as a conveyance by all the commoners to each, is furnished by the Conveyancing Act, 1874.<sup>5</sup>

## SECTION 3.—COMMON INTEREST.

SUBSECTION (1).—*Definition.*

**1388.** “A species of right differing from common property takes place among the owners of subjects possessed in separate portions, but still united by their common interest. It is recognised in law as *common interest*.”<sup>6</sup> The term is sometimes used in connection with the common right of proprietors of land in running water which flows through their lands, or in a road of access or open space, or the common right of frontagers or members of the public in the space above a street as the source of light and air;<sup>7</sup> but the term is peculiarly applicable to the rights of proprietors of different flats or dwelling-houses, contained in a single

<sup>1</sup> 1695, c. 38.<sup>2</sup> C.A.S., 1913, C, iv. 1.<sup>3</sup> Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51), s. 5 (3).<sup>4</sup> *Bruce v. Bain*, 1883, 11 R. 192.<sup>5</sup> 37 & 38 Vict. c. 94, s. 35.<sup>6</sup> Bell, Prin., s. 1086; *Grant v. Heriot's Trust*, 1906, 8 F. 647, per Lord Pres. Dunedin at p. 659.<sup>7</sup> *Donald & Sons v. Esslemont & Macintosh*, 1923 S.C. 122; *Mackenzie v. Carrick*, 1869, 7 M. 419.



building or tenement under one roof and between the same gables and walls, over every part of the building besides the flat of which they are proprietors.

SUBSECTION (2).—*Law of the Tenement.*

**1389.** The law of the tenement is fully discussed by Lord Dunedin in *Smith v. Giuliani*,<sup>1</sup> and may be summarised in the following sentence from his Lordship's opinion: "Each proprietor of a flat is proprietor of it, but along with his proprietorship there is linked the common interest in the walls or roof, as the case may be, of the other proprietors, and this common interest is not a right of servitude nor of common property, but is a right of a proprietary character." The general principles of this branch of the law were first laid down by Stair as follows:<sup>2</sup> "When divers owners have parts of the same tenement, it cannot be said to be a perfect division, because the roof remaineth roof to both, and the ground supporteth both; and therefore, by the nature of communion, there are mutual obligations on both, viz. that the owner of the lower tenement must uphold his tenement as a foundation to the upper, and the owner of the upper tenement must uphold his tenement as a roof and a cover to the lower; both which, though they have the resemblance of servitudes, and pass with the thing to singular successors, yet they are rather personal obligations, such as pass in communion even to the singular successors of either party." Bankton<sup>3</sup> and Erskine<sup>4</sup> are to the same effect.

**1390.** In the earliest reported cases<sup>5</sup> the Court leant to the view that there was an actual right of common property in the walls of a tenement, but since the cases of *Fergusson v. Marjoribanks*<sup>6</sup> and *Pirnie v. M' Ritchie*<sup>7</sup> it has been decided that the right of the owner of each storey in the walls of the tenement is one of common interest and not of common property.<sup>8</sup> See COMMON GABLE. It must be borne in mind that the rights of the proprietors of the flats are ruled, in the first place, by their titles, and that it is only failing specialties in the titles that the rules of common interest are applied.<sup>9</sup> Any obligation beyond those recognised as being implied by the common interest of the proprietors must be repeated in the titles of the singular successor against whom it is alleged.<sup>10</sup>

**1391.** As a rule, the part of the solum on which the common stair or passage communicating with the several dwelling-houses rests, is the common property of the proprietors. With this exception, the owner or

<sup>1</sup> 1925 S.C. (H.L.) 45, at pp. 56–59.

<sup>2</sup> Inst. ii. 7, 6.

<sup>3</sup> ii. 7, 9.

<sup>4</sup> Inst. ii. 9, 11.

<sup>5</sup> *Anderson v. Dalrymple*, 1799, Mor. 12,831; *Reid v. Nicol*, 1799, Mor. voce Property, App. No. 1; *Sharp v. Robertson*, 1800, *ibid.*, No. 3.

<sup>6</sup> 12th Nov. 1816, F.C.

<sup>7</sup> 5th June 1819, F.C.

<sup>8</sup> Lord Ivory's Notes to Ersk. ii. 9, 11; *Gellatly v. Arrol*, 1863, 1 M. 592; *Morris v. Bicket*, 1864, 2 M. 1082, per Lord Justice-Clerk Inglis at p. 1089.

<sup>9</sup> *Gellatly v. Arrol*, 1863, 1 M. 592.

<sup>10</sup> *Nicolson v. Melvill*, 1708, Mor. 14516.

owners of the lowest floor are proprietors of that part of the solum which their flats cover, and of the portions of the front and back area adjacent thereto, subject to the common interest of the upper proprietors, who can only object to such operations on the solum as might be injurious to the upper flats,<sup>1</sup> and cannot prevent the proprietor of the solum converting his dwelling into shops, and building over the front and back area, even though the upper proprietors had in their titles a right in common to the area.<sup>2</sup> Loss of amenity by the upper proprietors gives no good title to object to such alteration.<sup>3</sup> Where the lowest proprietor has, by his titles, only a joint ownership in the solum together with the upper proprietors, they have a good title to object to such alterations.<sup>4</sup> The proprietor of an upper flat is not entitled to rest any projecting building on the top of a building erected by the lowest proprietor on the area;<sup>5</sup> but the lower proprietor cannot object to a projection which does not rest on his building, unless he can instruct injury.<sup>6</sup> Although prevented by title from building over the front area, the lowest proprietor may yet build over the back green,<sup>7</sup> unless the upper proprietors have a joint right of property in or servitude over the back green.<sup>8</sup>

**1392.** Similarly, the owner of the uppermost storey is proprietor of the roof<sup>9</sup> but is bound to upkeep it in the common interest of the other proprietors. He may make alterations in the roof, if not injurious to the other proprietors;<sup>10</sup> but he may not add another storey to the building without consent.<sup>11</sup> If the topmost flat is divided into separate properties each proprietor has a several right to that portion of the roof which covers his portion of the flat, subject to the common interest of the proprietors of the other flats.<sup>12</sup>

**1393.** A proprietor of an intermediate flat has the sole property of the space within his flat, together with sole property in such walls (other than common gables) as he does not possess in common with his neighbours laterally. The Court will allow him to make any alterations which are not productive of danger to the other flats,<sup>13</sup> at sight of a reporter<sup>14</sup>; but the onus of proving no danger rests on him;<sup>15</sup> and the

<sup>1</sup> *Stewart v. Blackwood*, 1829, 7 S. 362.

<sup>2</sup> *Johnston v. White*, 1877, 4 R. 721.

<sup>3</sup> *Barclay v. M'Ewen*, 1880, 7 R. 792; *Calder v. Merchant Company of Edinburgh*, 1886, 13 R. 623; and *Birrell v. Lumley*, 1905, 12 S.L.T. 719.

<sup>4</sup> *Sutherland v. Barbour*, 1887, 15 R. 62; *Turner v. Hamilton*, 1890, 17 R. 494.

<sup>5</sup> *Stewart v. Blackwood*, 1829, 7 S. 362; *Arrol v. Inches*, 1887, 14 R. 394.

<sup>6</sup> *Urquhart v. Melville*, 1853, 16 D. 307; *M'Arley v. French's Trs.*, 1883, 10 R. 574.

<sup>7</sup> *Boswell v. Mags. of Edinburgh*, 1881, 8 R. 986.

<sup>8</sup> *Taylor's Trs. v. M'Gavigan*, 1896, 23 R. 945.

<sup>9</sup> *Taylor v. Dunlop*, 1872, 11 M. 25, per Lord Deas at p. 29.

<sup>10</sup> *Taylor v. Dunlop*, *supra*.

<sup>11</sup> *Sharp v. Robertson*, 1800, Mor. voce Property, App. No. 3; *Watt v. Burgess' Trs.*, 1891, 18 R. 766.

<sup>12</sup> *Sanderson's Trs. v. Yule*, 1897, 25 R. 211.

<sup>13</sup> *Hall v. Corbet*, 1698, Mor. 12775; *Ferguson v. Marjoribanks*, 12th Nov. 1816, F.C.; *Picnic v. M'Ritchie*, 5th June 1819, F.C.; *M'Kean v. Davidson*, 1823, 2 S. 480.

<sup>14</sup> *Dennistoun v. Bell*, 1824, 2 S. 784.

<sup>15</sup> *Gray v. Greig*, 1825, 4 S. 104; *Murray v. Gullan*, 1825, 3 S. 639 (N.E. 448); *Brown v. Boyd*, 1841, 3 D. 1205.

comfort and amenity of the other proprietors must be considered ;<sup>1</sup> and he must repair any damage done without regard to expense.<sup>2</sup> A proprietor of a flat can make no alterations without consent in any wall of which he has not sole property,<sup>3</sup> but a right to deal with the wall of another in a certain way may be set up by prescription.<sup>4</sup> The proprietor of a flat is entitled to cut through the wall separating it from the adjoining tenement which he also owns.<sup>5</sup>

**1394.** The floors and ceilings of flats are common property between the upper and lower proprietors; and the ordinary rules applicable to common gables would apply to proposed alterations in them, subject to the common interest of all the proprietors of the tenement in the beams or supports.

**1395.** The common stairs, including the walls of the staircase, are the common property of all the proprietors with right of access thereto.<sup>6</sup> As regards rebuilding a tenement and the protection of the existing common interest see the undernoted cases.<sup>7</sup>

<sup>1</sup> *Johnston v. White*, 1877, 4 R. 721.

<sup>2</sup> *M'Nair v. M'Lauchlan*, 1826, 4 S. 546 (N.E. 554).

<sup>3</sup> *Hall v. Corbet*, 1698, Mor. 12775; *Walker v. Braidwood*, 1797, Hume, Dec. 512; *Graham v. Greig*, 1838, 1 D. 171; *Taylor v. Dunlop*, 1872, 11 M. 25.

<sup>4</sup> *Munro v. Jervey*, 1821, 1 S. 161 (N.E. 154).

<sup>5</sup> *Todd v. Wilson*, 1894, 22 R. 172.

<sup>6</sup> *Anderson v. Dalrymple*, 1799, Mor. 12831; *Reid v. Nicol*, 1799, Mor. voce Property, App. No. 1; *Anderson v. Saunders*, 1831, 9 S. 564; *Sandy v. Innes*, 1823, 2 S. 221 (N.E. 195); *Ritchie v. Purdie*, 1833, 11 S. 771; *Graham v. Greig*, 1838, 1 D. 171; *Gellatly v. Arrol*, 1863, 1 M. 592; *Taylor v. Dunlop*, 1872, 11 M. 25.

<sup>7</sup> *Stewart v. Blackwood*, 1829, 7 S. 362; *Young v. Cuddie*, 1831, 9 S. 500; *Murray v. Brownhill*, 1715, Mor. 14521.

## COMMON STAIR.

See LANDLORD AND TENANT; NEGLIGENCE.

## COMMONS, HOUSE OF.

*See* PARLIAMENT.

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## COMMONTY.

*See* COMMON PROPERTY AND COMMON INTEREST.

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## COMMUNIO BONORUM.

*See* HUSBAND AND WIFE.

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## COMMUNION ELEMENTS.

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